On January 9, 2003, Mexico filed suit in the International Court of Justice (ICJ) on behalf of over 50 Mexican nationals on death row in the United States.[64] In each case, Mexico argued, its nationals had been deprived of their rights to seek consular assistance under Article 36 of the VCCR. Among other issues, the Government of Mexico asked the Court to adjudge and declare that the United States had violated its international legal obligations by failing to comply with Article 36 of the VCCR, and that the convictions and sentences of its nationals should be vacated.

The ICJ issued its final judgment in the *Avena* case on March 31, 2004. By a vote of 14 to one, the Court found that, for 51 Mexican nationals, the United States had failed to inform the detainees of their right to consular notification without delay, in violation of Article 36 (1) (b) of the VCCR. In 49 cases, the Court also found that the United States had violated its corresponding obligation to notify the Mexican consulate of the detention without delay, as well as Mexico's right to communicate and have access to its nationals. In 34 of the cases, the United States was also found to have deprived Mexico of its right to arrange for legal representation of those nationals in a timely manner, in breach of Article 36, paragraph 1 (c). The ICJ also reaffirmed its previous jurisprudence finding that Article 36 of the Vienna Convention gives rise to individual rights.[65]

The *Avena* Court found that, in all 51 cases, the United States was obligated to provide judicial review and reconsideration of the convictions and sentences in light of the violations of Article 36. The Court held that review must be effective, and must give "full weight" to the violation of the rights set forth in Article 36, "whatever may be the actual outcome of such review and reconsideration."[66] The ICJ also unanimously held that the same remedy must be applied to all future cases in which Mexican nationals in the United States are sentenced to "severe penalties" without their Article 36 rights having been respected.[67] Furthermore, the remedy of "review and reconsideration" applies in all of the named or future cases regardless of domestic rules of procedural default.[68] The Court declined to adopt Mexico's position that the convictions and sentences of all 51 nationals must automatically be vacated, while indicating that such remedies could result where the treaty violation was found by the United States courts to be prejudicial.

Responding in dicta to the U.S. argument that it can be extremely difficult to identify foreign nationals, the Court observed that "were each individual to be told upon arrest that, should he be a foreign national, he is entitled to ask for his consular post to be contacted," Article 36 compliance "would be greatly enhanced," adding that this advisement "could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed"[69] under *Miranda*.



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[64] *See* Application Instituting Proceedings (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003), available at <http://www.icj-cij.org/docket/files/139/14582.pdf>.
[65] *See* LaGrand Case (F.R.G. v. U.S.) 2001 ICJ 104.
[66] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), ¶ 139.
[67] Avena, ¶ 153(11).
[68] *Id.* ¶ 141.
[69] *Id.* ¶ 64.

*U.S. Supreme Court's Responses to* Avena

In *Sanchez-Llamas v. Oregon*, the Supreme Court granted review in two consolidated cases involving violations of the VCCR. The two foreign national petitioners had unsuccessfully raised Article 36 claims in state court proceedings but were not part of the *Avena* litigation. The Court granted certiorari to resolve the following questions:

> "First, does Article 36 create rights that defendants may invoke against the detaining authorities in a criminal trial or in a postconviction proceeding? Second, does a violation of Article 36 require suppression of a defendant's statements to police? Third, may a State, in a postconviction proceeding, treat a defendant's Article 36 claim as defaulted because he failed to raise the claim at trial?"[70]

A bare majority of the Court bypassed the first and most basic issue, assuming without deciding that Article 36 does confer individually-enforceable rights, but finding it "unnecessary to resolve the question" because the petitioners were not entitled to the requested relief.[71] Addressing the second question, since "neither the Vienna Convention itself nor our precedents applying the exclusionary rule support suppression" on these grounds, the exclusion of evidence is never an available remedy for an Article 36 violation *per se*. Responding to the third question (which had been briefed largely on the basis of *Avena*), the Court held that "a State may apply its regular procedural default rules to Convention claims"[72] despite the ICJ's decision in *Avena*. The Court held that while the judgments of the International Court of Justice (ICJ) are entitled to "respectful consideration," "nothing in the ICJ's structure or purpose suggests that its interpretations were intended to be binding on U. S. courts."[73]

However, the majority noted that an Article 36 violation *can* be relevant to determining the admissibility of a defendant's statements, and implied that courts were free to craft additional pre-trial remedies for VCCR violations:

> [S]uppression is not the only means of vindicating Vienna Convention rights. A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police. If he raises an Article 36 violation at trial, a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance.[74]

While *Sanchez-Llamas* resolved some important questions regarding the interpretation of Article 36, it left unanswered the enforceability of the *Avena* Judgment in those cases to which the ICJ decision expressly applies. In one of those cases, *Medellín v. Dretke*, the Supreme Court granted certiorari to resolve the following questions: (1) whether a federal court is legally bound to apply the *Avena* Judgment notwithstanding procedural default doctrines that would otherwise bar relief; and (2) whether a federal court should give effect to the *Avena* Judgment as a matter of judicial comity and in the interest of uniform treaty interpretation.

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[70] *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S.Ct. 2669, 2674 (2006).

[71] *Sanchez-Llamas*, 548 U.S. at 342-343. The four dissenting justices held that Article 36 does confer individual rights, but divided 3-1 on the availability of the requested remedies.

[72] *Id.* at 354.

[73] *Id.*

[74] *Id.* at 350.

On February 28, 2005, in response to the petitioner's filings in the *Medellín* case, President Bush issued a memorandum to the Attorney General declaring that:

> I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America (Avena)*, 2004 I.C.J. 128 (Mar. 31), by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Shortly before the Supreme Court was scheduled to hear oral arguments in the case, Mr. Medellín and other Mexican nationals on Texas's death row filed successive habeas petitions in the Texas courts. The petitions relied on the *Avena* Judgment and the Presidential determination in seeking review of the consular rights violations found by the ICJ. In a per curiam opinion issued on May 23, 2005, the Supreme Court dismissed the writ of certiorari as improvidently granted "[i]n light of the possibility that the Texas courts will provide Medellín with the review he seeks pursuant to the *Avena* Judgment and the President's memorandum."[75] The Texas Court of Criminal Appeals (CCA) later dismissed Medellín's subsequent habeas application, finding that it was procedurally barred under the Texas statute governing successive petitions.

The Supreme Court granted certiorari and issued its decision on March 25, 2008. The majority found it undisputed that *Avena* "constitutes an *international* law obligation on the part of the United States,"[76] but held that none of the treaties addressing the enforcement of ICJ decisions are "self-executing," meaning that their requirements cannot be directly enforced by the U.S. courts. Consequently, the Court concluded that "neither Avena nor the President's Memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions," and thus neither *Avena* nor the Presidential memorandum required state courts to provide review and reconsideration of the claims of the 51 Mexican nationals named in the ICJ decision.[77] The Court also held that President Bush lacked the constitutional authority to order the state courts to provide "review and reconsideration" of the Vienna Convention violations in the affected cases.

Three aspects of the *Medellín* decision bear emphasis. First, every member of the Court recognized that the United States has an international legal obligation to comply with *Avena*. Second, every justice acknowledged that the national interest in securing full domestic compliance with *Avena* is "plainly compelling," since that would result in "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law."[78] Third, the Court determined

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[75] *Medellín v. Dretke*, 544 U.S. 660, 666 (2005) (*per curiam*).
[76] *Medellín v. Texas*, 128 Sup. Ct. 1346, 1356 (2008).
[77] *Medellín*, 128 S. Ct. at 1353.
[78] *Id.* at 1367.

that the responsibility for vindicating these plainly compelling national interests rests not with the courts but with the U.S. Congress.[79]

**4. Prior action on this issue by the ABA and peer organizations**

For more than a decade, divisions of the ABA have been in the forefront of efforts to enhance the fairness of criminal justice proceedings by securing full compliance with the United States' Article 36 obligations. At its 1998 annual meeting, the Law Student Division adopted a resolution calling on the ABA to urge "federal, state, territorial and local law enforcement authorities to adopt a warning of rights similar to the "Miranda" standard, advising foreign nationals of their right to consular assistance" and that "this warning be given at the moment of detention and identification of the foreign national by law enforcement authorities". The resolution further called on law enforcement agencies to "adopt the procedures and statements proposed by the Department of State in its handbook titled Consular Notification and Access" and that the ABA should encourage "the Attorney General of the United States, as well as the public defenders and attorneys general of all the States and territories, to work together to disseminate the knowledge and the enforcement of these rights."[80] The resolution was adopted by the ABA House of Delegates in August of 1998.[81]

The ABA House of Delegates also reaffirmed its support for resolving international disputes in the International Court of Justice when it adopted a policy in 1994 recommending that the United States Government present a declaration recognizing that the International Court of Justice has "compulsory" jurisdiction in all legal disputes concerning "the interpretation of a treaty," "any question of international law," or "the nature or extent of the reparation to be made for the breach of an international obligation."[82]

Recognizing the crucial significance of consular assistance to the effective representation of capital defendants, the 2003 *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* added a new standard to address the issue. Guideline 10.6 requires that counsel "at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals." Unless predecessor counsel has already done so, counsel representing a foreign national should "immediately advise the client of his or her right to communicate with the relevant consular office" and obtain the consent of the client to contact the consular office." After obtaining consent, "counsel should immediately contact the client's consular office and inform it of the client's detention or arrest." The Commentary to the Guideline notes that enlisting the consulate's support should be viewed by counsel "as an important element in defending a foreign

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[79] *See, e.g., id.* at 1368 ("[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress"); *id.* at 1391 (Breyer, J., dissenting) (majority's holdings "encumber Congress with a task (postratification legislation)").

[80] The full text is available at <www.abanet.org/intlaw/policy/misc/consularassistance.pdf> (last accessed May 26, 2009).

[81] "Urge U.S. law enforcement authorities to comply with the Vienna Convention by advising foreign nationals of Right to Consular Assistance." (98A125) 8/98. Listed on the ABA Section of International Law website *at* <http://www.abanet.org/intlaw/leadership/policy/misc.html>.

[82] *See* Brief of the American Bar Association as Amicus Curiae in Support of Petitioner at 2, Medellín v. Dretke, 544 U.S. 660 (2005) (Jan. 24, 2005), 2005 WL 176451.

national at any stage of a death penalty case" and counsel "should also give careful consideration to the assertion of any legal rights that the client may have as a result of any failure of the government to meet its treaty obligations."[83]

The ABA has raised concerns over Article 36 violations in individual cases of foreign nationals facing execution. In December of 1998, the ABA President sent a letter to then-Governor George W. Bush of Texas, urging him to grant a reprieve in the case of a Canadian national facing imminent execution despite an undisputed and unremedied violation of his Article 36 rights. The letter emphasized that the ABA's interest in seeking a stay of execution to permit a more thorough clemency review stemmed from "its long-standing support for adherence to the requirements of Article 36(1) (b) of the Vienna Convention on Consular Relations."[84]

The ABA has also been a staunch advocate of individual rights under Article 36 and judicial remedies for its violation. It has submitted a series of *amicus curiae* briefs to the U.S. Supreme Court, arguing among other issues that state rules of procedural default should yield to Article 36 obligations,[85] that the United States is bound under the VCCR Optional Protocol to comply with the ICJ decisions on consular rights and remedies,[86] and that the *Avena* Judgment should be given effect by the domestic courts.[87]

Other domestic legal associations have played prominent roles as supporting *amici* before the Supreme Court on these issues, including the National Association of Criminal Defense Lawyers, the Hispanic National Bar Association, the Mexican American Bar Association, the Mexican American Legal Defense and Educational Fund, and the Constitution Project. International bar associations have also advocated before the Supreme Court for Article 36 rights and remedies, including the Bar Human Rights Committee of England and Wales and the Australian Law Council.[88]

The Union Internationale des Avocats (International Association of Lawyers) has a particularly long history of activity on this issue, beginning with its 1997 *amicus curiae* brief in *Republic of Paraguay v. Allen,* 134 F.3d 622 (4th Cir. 1998), arguing that failure of the federal courts to remedy Article 36 violations would impair worldwide efforts to secure basic human rights and implement the rule of law. Prior to the execution of Jose Medellín, the UIA sent a letter to the Governor of Texas urging him to take immediate steps to commute the death

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[83] ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (February 2003), Guideline 10.6, Additional Obligations of Counsel Representing a Foreign National, pp. 73-75.

[84] Letter from Philip S. Anderson President, American Bar Association to The Hon. George W. Bush, Governor of Texas, Dec. 9, 1998, at 1.

[85] Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (Dec. 22, 2005), 2005 WL 3597819.

[86] Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, Medellín v. Dretke, 544 U.S. 660 (2005) (Jan. 24, 2005), 2005 WL 176451.

[87] Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, Medellin v. Texas, 128 S.Ct. 1346 (U.S. 2008) (Jun. 28, 2007), 2007 WL 1886208.

[88] A full collection of the Supreme Court amicus briefs filed by these and other organizations in support of Article 36 rights and remedies is posted on the website of Debevoise and Plimpton LLP, *at* <http://www.debevoise.com/vccr/> (last accessed May 26, 2009).

sentence.[89] Following the execution, the UIA issued a press release in which it "underscore[s] the fact that José Medellín has been executed in violation of international law. It invites the US authorities – both federal as well as Texan – to take the necessary legislative measures to respond appropriately to decisions taken by the ICJ."[90]

Finally, some 60 nations that are parties to the VCCR have stated as *amici* before the U.S. Supreme Court that Article 36 confers legally-enforceable rights and that judicial review is required whenever those rights are violated. In addition, federal laws in countries as diverse as Australia, the UK, Poland, Ecuador, Indonesia and Lithuania "require advising foreign detainees of their consular rights simultaneously with other legal rights."[91]

**5. Reasons for Recommendation**

Ensuring that foreigners arrested in the United States are promptly notified of their right to consular notification does far more than protect the reciprocal rights of Americans abroad. As a senior federal judge has pointed out, by providing foreign defendants with the means necessary to mount a full defense against serious charges, timely consular assistance enhances the truth-seeking function that lies at the heart of American justice:

> [C]onsular notification and access are absolutely essential to the fair administration of our criminal justice system. Just as a lawyer guides a criminal defendant through the unknown territory of the justice system, diplomatic officials are often the only familiar face for detained nationals, and the best stewards to help them through the ordeal of criminal prosecution. . . . Without these aids, I think that we presume too much to think that an alien can present his defense with even a minimum of effectiveness. The result is injury not only to the individual alien, but also to the equity and efficacy of our criminal justice system.[92]

Despite these compelling reasons for ensuring domestic compliance with Article 36 obligations, recent actions have weakened American commitment to the VCCR. The Supreme Court, in *Medellín*, effectively rendered ICJ decisions relating to the VCCR powerless in the absence of implementing congressional legislation. The Bush administration, meanwhile, through a post-*Avena* 2005 letter from Secretary of State Condoleezza Rice to UN Secretary-General Kofi Annan, withdrew from the Optional Protocol, no longer consenting to compulsory ICJ jurisdiction for matters related to the Vienna Convention. Domestic compliance, meanwhile, despite the best efforts of the State Department and numerous other federal, state, and local

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[89] Letter from UIA President Hector Diaz-Bastien to the Hon. Rick Perry (June 3, 2008). *Available at* <http://dlh.uianet.org/uploads/tx_hhuiadlh/UIA_Letter_-Medellin_080603.pdf> (last accessed May 26, 2009).

[90] UIA, Execution of Jose Medellin in Texas (Aug. 28, 2008), *available at* <http://dlh.uianet.org/uploads/tx_hhuiadlh/UIA_CP_Medellin_080827_GB_01.pdf> (last accessed May 26, 2009).

[91] *See* Human Rights Research, *Individual Consular Rights: Foreign Law and Practice*, available at <http://users.xplornet.com/~mwarren/foreignlaw.html> (last accessed May 26, 2009).

[92] U.S. v. Li, 206 F.3d 56, 78 (1st Cir. 2000) (Torruella, C.J., concurring in part and dissenting in part).

agencies, remains spotty and inconsistent. As Justice Breyer pointed out in his *Medellín* dissent, such non-compliance increases the risk of "worsening relations" with other nations, especially neighbors like Mexico; furthermore, it could have the effect of "of precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or of diminishing our Nation's reputation abroad as a result of our failure to follow the 'rule of law' principles that we preach."[93]

In light of these recent developments, it is essential that the ABA unequivocally affirm its longstanding commitments to the international rule of law and to Article 36 compliance. To that effect, the recommendation encourages United States authorities to uphold Vienna Convention principles domestically through legal and political action and guidelines designed to facilitate and improve compliance.

Lorna G. Schofield
Chair, ABA Section of Litigation
February 2010

[93] *Medellín*, 128 S.Ct. at 1391 (Breyer, J., dissenting).

GENERAL INFORMATION FORM

Submitting Entity: Section of Litigation

Submitted by: Lorna G. Schofield, Chair

1. Summary of Recommendation.

The Vienna Convention on Consular Relations (VCCR) is a binding multilateral treaty that codifies the rights, privileges, immunities, and functions of consulates worldwide. Article 36 of the VCCR regulates the provision of timely consular information, notification, and assistance to detained foreign nationals. Since ratifying both the Convention and the Optional Protocol in 1969, the United States has relied on the VCCR and its binding enforcement mechanisms to safeguard the consular rights of its citizens in other countries. Despite efforts by the State Department and Justice Department to promote compliance, many states continue to fall short of Vienna Convention standards, and only three states have enacted legislation addressing consular notification requirements. The Recommendation affirms the ABA's commitment to the international rule of law and encourages federal, state and territorial authorities to uphold Vienna Convention principles domestically through political action and improved domestic compliance.

2. Approval by Submitting Entity.

On October 2, 2009, the Section of Litigation Council approved the Recommendation during a regularly-scheduled meeting, for which the time and agenda had been previously distributed.

3. Has this or a similar recommendation been submitted to the House or Board previously?

In 1994, the House of Delegates adopted a policy recommending that the United States Government present a declaration recognizing that the International Court of Justice has compulsory jurisdiction in all legal disputes concerning a treaty or a question of international law. In 1998, the House of Delegates adopted a resolution advising a set of measures designed to further domestic compliance with Article 36 obligations. Both of these resolutions are more than ten years old; the current proposed Recommendation is consistent with these prior resolutions, and also it builds on them to address more recent events in this area, including recent Supreme Court and Executive Branch actions.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

None.

5. What urgency exists which requires action at this meeting of the House?

As noted in the Report and Recommendation, recent Supreme Court and Executive Branch actions have weakened American commitment to VCCR obligations. In addition, only three states have enacted legislation addressing VCCR consular notification requirements. In light of

recent developments, it is important that the ABA unequivocally affirm its longstanding commitment to the international rule of law and Article 36 compliance.

6. Status of Legislation. (If applicable).

N/A

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of the recommendation will not result in expenditures.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

This Recommendation is being co-sponsored by the following Association entities and Affiliated Organizations:

Section of Criminal Justice
Section of Individual Rights & Responsibilities
Section of International Law
Death Penalty Representation Project
Standing Committee on Legal Aid and Indigent Defendants
Young Lawyers Division
Section of State and Local Government Law
Government and Public Sector Lawyers Division

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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## EXECUTIVE SUMMARY

### 1) Summary of the Issue Which the Recommendation Addresses

The Vienna Convention on Consular Relations (VCCR) is a binding multilateral treaty that codifies the rights, privileges, immunities, and functions of consulates worldwide. Article 36(1)(b) of the VCCR regulates the provision of timely consular information, notification, and assistance to detained foreign nationals. When international delegates met to draft the Convention in the 1960s, the United States successfully lobbied for the inclusion of an Optional Protocol, a binding enforcement mechanism that would grant the International Court of Justice (ICJ) with jurisdiction over claims arising from the VCCR.

Since ratifying both the Convention and the Optional Protocol in 1969, the United States has consistently relied on the VCCR and its binding enforcement mechanisms to safeguard the consular rights of its citizens in other countries. At home, however, the record of U.S. compliance with Article 36 obligations has been inconsistent, and at times deficient—even in cases that resulted in death sentences. Despite efforts by the State Department and Justice Department to promote compliance, many states continue to fall short of Vienna Convention standards, and only three states have enacted legislation addressing consular notification requirements. The inconsistent enforcement of the VCCR threatens the individual rights not only of foreign nationals arrested in the United States but also of American citizens detained abroad who rely on reciprocal compliance.

For more than a decade, the ABA has stood at the forefront of efforts to enhance the fairness of criminal justice proceedings by securing full compliance with the United States' Article 36 obligations. In 1998, the House of Delegates adopted a resolution calling for domestic law enforcement officials to provide foreign nationals with timely notice of their right to consular assistance and advocating the more widespread dissemination of information relating to that right. Four years earlier, the House of Delegates reaffirmed the ABA's commitment to the rule of international law when it recommended that the United States recognize the jurisdiction of the International Court of Justice in any legal dispute concerning a treaty or a question of international law. The ABA has also been, through a series of amicus curiae briefs to the Supreme Court, a staunch advocate of individual rights under Article 36 and judicial remedies for their violation.

Despite these efforts by the ABA, recent actions have weakened American commitment to VCCR obligations. The U.S. Supreme Court, in *Sanchez-Llamas v. Oregon* (2006), contradicted the ICJ in concluding that Vienna Convention claims are subject to the application of state procedural default rules. Subsequently, in *Medellin v. Texas* (2008), the Court held that the nation's treaty obligations under the VCCR, the Optional Protocol, and the U.N. Charter, without implementing congressional legislation, do not make ICJ decisions enforceable in domestic courts. In addition, the Bush Administration recently withdrew from the Optional Protocol.

2) **How the Proposed Policy Position Will Address The Issue**

In light of these recent developments, it is essential that the ABA unequivocally affirm its longstanding commitments to the international rule of law and to Article 36 compliance. To that effect, the recommendation encourages United States authorities to uphold Vienna Convention principles domestically through political action and improved domestic compliance. The complexity of these issues and the wide array of actors involved demands that we address this crucial concern in a variety of ways, including recommending implementing legislation at the national and state levels, advocating improved compliance procedures for law enforcement agencies, and facilitating the provision of competent and well-informed counsel to arrested foreign nationals.

3) **Summary of the Recommendation**

The recommendation calls for legislative and executive bodies to take steps to ensure enforceable Article 36 rights in the United States. We urge federal and state legislative bodies to adopt laws implementing Article 36 requirements domestically and preventing procedural default rules from overriding VCCR rights. We further urge the Obama Administration to renew the nation's commitment to the Optional Protocol, thereby making clear the United States' faith in the ICJ to sustain the international rule of law.

The recommendation also builds off the ABA's 1998 recommendations, advising a set of measures designed to further domestic compliance with Article 36 obligations. We urge law enforcement authorities to implement Miranda-like warnings advising foreign nationals of their Article 36 rights as soon as they are detained and identified, and to adopt the State Department's recommended compliance procedures. We urge counsel for accused foreign nationals, in all criminal defense proceedings, to comply with ABA consular notification procedures previously limited to death penalty cases. We urge federal and state public defenders and Criminal Justice Act panels to disseminate knowledge of VCCR rights and appropriate procedures for exercising them to counsel who may represent foreign nationals. And we recommend that the ABA itself provide educational materials and resources to U.S.-based consular officials who may otherwise have difficulty identifying competent local counsel in response to VCCR requests.

4) **Summary of Minority Views or Opposition**

No opposition or minority views have been expressed.

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Farber | Schreck

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# Fax Cover Sheet

**DATE:** February 23, 2010

| **TO:** | FARA Registration Unit | **PHONE NO.** | **FAX NO.** |
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| **FROM:** | William Moschella | | 202-514-2836 |
| **RE:** | Information Materials distributed by Brownstein Hyatt Farber Schreck, LLP (#5870) on behalf of the Embassy of Mexico | | |

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IF YOU DO NOT RECEIVE ALL OF THE PAGES, OR IF YOU ENCOUNTER ANY DIFFICULTIES WITH THIS TRANSMISSION, PLEASE CALL OUR OFFICE AT **202.296.7353**. THANK YOU.

**Message:**

Attention: FARA Registration Unit

Please find attached 28 pages of Information Materials distributed by BHFS, LLP (#5870) on behalf of the Embassy of Mexico. If you do not receive 27 pages of information and the cover sheet please call Theodosia Sorto at 202-652-2340.

ABA VCCR-Avena resolution adopted.pd, 6pages

ABA VCCR-Avena resolution final report, 21pages

Thank you,

*William E. Moschella*

Willam R. Moschella

2010 FEB 23 AM 10: 11

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ADOPTED

# AMERICAN BAR ASSOCIATION

## SECTION OF LITIGATION
## SECTION OF CRIMINAL JUSTICE
## SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
## SECTION OF INTERNATIONAL LAW
## DEATH PENALTY REPRESENTATION PROJECT
## COMMISSION ON IMMIGRATION

## REPORT TO THE HOUSE OF DELEGATES



## RECOMMENDATION

RESOLVED, That the American Bar Association urges the United States and upon state and territorial governments to work to ensure that the fundamental protections of Article 36 to the Vienna Convention on Consular Relations ("Article 36") are extended fully and without obstacle to foreign nationals within United States borders; and

FURTHER RESOLVED, That the American Bar Association urges the United States to work to ensure that the fundamental protections of Article 36 are extended fully and without obstacle to United States citizens in foreign countries; and

FURTHER RESOLVED That the American Bar Association urges the President and Congress to renew the United States' commitment to the implementation of the Vienna Convention and to the enforcement of its obligations under the United Nations Charter and the Optional Protocol to the Vienna Convention by:

(1) Seeking means to fully implement the decision of the International Court of Justice in *Avena and Other Mexican Nationals* through legislation and other means, where possible;

(2) Recognizing that disputes arising out of the interpretation of the Vienna Convention and related questions of international law should be decided by the International Court of Justice; and

(3) According the decisions of the International Court of Justice with regard to those disputes binding force within the United States, including honoring and enforcing any International Court of Justice judgments to which the United States is a party; and

FURTHER RESOLVED That the American Bar Association urges the President and Congress, as well as state and territorial executives, officials, and legislatures, to advance the implementation of and compliance with Article 36 of the Vienna Convention in the United States through the following measures:

(1) Drafting and adopting appropriate legislation that would codify the protections of Article 36 of the Vienna Convention into United States and state law, including but not limited to the following:

(a) Enacting legislation requiring that a person who is arrested or detained shall be advised without delay that if the arrestee or detainee is a foreign national, the foreign national has a right to communicate with an official from the consulate of the foreign national's country, and that if the arrestee or detainee chooses to exercise this right the advising officer notify the pertinent official in the officer's agency or department of that fact; and

(b) Enacting legislation that renders procedural default rules inapplicable to an assertion in criminal cases that the defendant's right under Article 36 has been violated; and

(2) Developing federal, state and territorial policies and procedures that enhance United States compliance

with Article 36 of the Vienna Convention, such as the following measures:

(a) Advising an arrestee or detainee as part of the booking process that foreign nationals have an Article 36 right to communicate with an official from the consulate of the foreign national's consulate;

(b) Adopting, as appropriate, policies and procedures that reflect and abide by the principles set forth in model guidelines or standards such as those promulgated by the United States Department of State or by Commission on Accreditation of Law Enforcement Agencies, regarding compliance with the Vienna Convention consular notification requirements;

(c) Taking steps to ensure that knowledge of these polices and procedures and of the right to consular notification is disseminated to federal, state, and local law enforcement personnel;

(d) Taking steps to ensure that a magistrate or judge informs a defendant at the first appearance that foreign nationals have an Article 36 right to communicate with an official from the consulate of the foreign national's consulate;

(e) Providing training for prosecutors, defense counsel, judges, and law enforcement personnel as to the United States' obligations under Article 36;

(f) Taking steps to ensure that for countries on the mandatory notification list, that mandatory notification does occur in all cases; and

FURTHER RESOLVED, That the American Bar Association urges prosecutors and criminal defense attorneys to become knowledgeable about the Vienna Convention's consular notification requirements and work to ensure effective exercise of those rights by foreign national defendants, including through the following measures:

(1) For prosecutors, assuming a responsibility to verify that a foreign national criminal defendant has been informed of the right to consular notification, and verifying that any request has been honored or that mandatory notification requirements have been met;

(2) For criminal defense attorneys in all cases, complying fully with ABA Guideline 10.6 "Additional Obligations of Counsel Representing a Foreign National" contained in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. 2003); and

FURTHER RESOLVED, That the American Bar Association urges state and territorial bar associations, in matters involving foreign national defendants, to establish local links with consulates in the United States to assist

the consulates in finding counsel for foreign national defendants, to provide other appropriate assistance to the consulates, to seek periodic assessments from consulates as to compliance with Article 36 by the United States and state and local governments, and to work with the consulates to propose and implement any necessary reforms and improvement.

# REPORT

## 1. Background on the VCCR and Its Optional Protocol

The Vienna Convention on Consular Relations (VCCR) is a binding multilateral treaty that codifies many of the rights, privileges, immunities and functions of consulates worldwide.[1] Currently ratified by 172 nations, its provisions are so essential to modern consular functions that the U.S. Department of State views the VCCR as "widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention."[2]

The VCCR addresses a range of matters related to consular function. The Convention establishes a set of protocols for the establishment and conduct of consular relations, while also prescribing specific privileges and immunities that should attach to consular officials.[3] Such provisions are intended to "ensure the efficient performance of functions by consular posts on behalf of their respective States."[4] The Convention itself details some of the various consular functions it aims to further. These functions include, most importantly for present purposes, the protection, in the receiving nation, of the interests of the sending nation and its nationals.[5]

Article 36 of the Convention operates within the scope of this protective function, specifically addressing the consular notification rights of arrested foreign nationals. Consular officers have long possessed the right under international law to assist their co-nationals.[6] Article 36(1)(b) of the VCCR regulates the provision of timely consular information, notification and assistance in the cases of nationals detained in a foreign country. Under its terms the detaining authorities must advise the foreign national "without delay" of his rights to consular communication and notification; at the informed request of the detainee, the authorities must then notify the consulate "without delay" that "a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Any "communication addressed to the consular post" by the foreign detainee must likewise be "forwarded by the said authorities without delay." Article 36(1)(c) grants consular officers the right "to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Finally, Article 36(2) provides that local laws and regulations "must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

The assistance that consulates provide to their arrested nationals is not confined to arranging for an attorney. As the State Department has instructed U.S. law enforcement, a consular officer may also "monitor the progress of the case, and seek to ensure that the foreign

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[1] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[2] Dep't of State Telegram 40298 to the U.S. Embassy in Damascus (February 21, 1975), *reprinted in* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145, Oxford: Clarendon Press (2d ed. 1991).

[3] Vienna Convention on Consular Relations, *supra* n. 1, at ch. I, II.

[4] *Id.* at preamble, cl. 5.

[5] *See id.* at art. V.

[6] *See* Wildenhus's Case, 120 U.S. 1, 4 (1887) (quoting Article 10, Reglements Consulaires, Bruxelles, 1857).

national receives a fair trial (e.g., by working with the detainee's lawyer, communicating with prosecutors, or observing the trial)."[7] Access to timely consular assistance is particularly significant in cases that may result in the death penalty or other severe punishments.[8] Prompt consular involvement serves to ensure that foreign defendants properly understand and exercise their legal rights,[9] bridges cultural barriers to augment the plea agreement process,[10] and results in the development of crucial mitigating evidence available only in the defendant's homeland.[11] In addition, a consulate "can provide critical resources for legal representation and case investigation" or may "file amicus briefs and even intervene directly in a proceeding if it deems that necessary."[12] Thus, prompt consular notification and access to foreigners arrested in the United States "may very well make a difference to a foreign national, in a way that trial counsel is unable to provide."[13]

The United States played a significant role in the development of the language of Article 36. In its draft form the article made notification of the consulate mandatory, with no reference to individual rights beyond a general entitlement to "communicate with and to have access to the competent consulate."[14] The U.S. delegation to the drafting conference objected to this formulation, observing that "[i]n its present form the draft...did not recognize the freedom of action of the detained persons."[15] The United States instead strongly supported the amendments

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[7] U.S. Dept. of State, CONSULAR NOTIFICATION AND ACCESS 22 (Jan. 2003), *available at* <http://travel.state.gov/pdf/CNA_book.pdf> (last accessed May 25, 2009). This Report and Recommendation, as well as the referenced Consular Notification and Access documents referred to herein, can be found at http://www.abanet.org/litigation/nosearch/report2010.html

[8] *See* Torres v. State, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005) (describing the protection of Mexican nationals facing capital proceedings as a top priority for Mexican consular officials).

[9] *See* State v. Ramirez, 732 N.E.2d 1065, 1070-71 (Ohio App. 3d. 1999) (compliance with Article 36 obligations would have avoided *Miranda* violation by helping foreign national appellant understand nuances of American legal system).

[10] *See* Ledezma v. State, 626 NW.2d 134, 152 (Iowa 2001) (consular officer would be able to address "general obstacles presented by cultural barriers" and help foreign national "obtain a greater understanding" of the charges and maximum sentence that would help him when considering plea offers and the presentation of his defense.").

[11] *See* Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (reversing death sentence for trial counsel's failure to seek consular assistance and observing that the court "cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate").

[12] Osagiede v. United States, 543 F.3d 399, 403 (7th Cir. 2008) (citing LEE, CONSULAR LAW AND PRACTICE, *supra* n. 2, at 125-88).

[13] Ledezma v. State, 626 NW.2d 134, 152 (Iowa 2001).

[14] Yearbook of the International Law Commission 1961, vol. II, p. 112.

[15] United Nations Conference on Consular Relations, Official Records, vol. I, UN Doc. A/Conf.25/16, p. 38 (para. 21).

requiring consular information followed by notification, in order "to protect the rights of the national concerned."[16]

At the instigation of the United States, the drafting conference also adopted a binding international dispute settlement mechanism for the VCCR, in the form of its Optional Protocol concerning the Compulsory Settlement of Disputes.[17] Article 1 of the Optional Protocol provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Under its Statute, the decisions of the International Court of Justice (ICJ) in cases brought under the VCCR Optional Protocol have "binding force...between the parties" and are "final and without appeal."[18] The UN Charter further requires that each Member of the United Nations "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[19]

The U.S. signed the Vienna Convention on April 24, 1963, but ratification did not occur for several years. Instead of submitting the treaty to the Senate, the Executive Branch initially chose to rely on bilateral agreements rather than the multilateral Convention.[20] By the late-1960s, however, the Nixon Administration had prioritized ratification, describing the Convention as "an important contribution to the development and codification of international law" that "should contribute to the orderly and effective conduct of consular relations between States."[21]

President Nixon sent the VCCR and the Optional Protocol to the Senate for its advice and consent on May 8, 1969. The Executive's report to the Senate noted that the Article 36 procedure "has the virtue of setting out a requirement that is not beyond the means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad." [22] The Senate was also made aware of the United States' support for a binding dispute settlement mechanism and that the U.S. delegation

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[16] *Id.* p. 337 (para. 39) (quoting U.S. delegate, speaking in support of a proposed amendment that notification of the consulate would occur only at the request of the detainee).

[17] Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

[18] Statute of the International Court of Justice, June 26, 1945, arts. 59, 60, 1 U.N.T.S. 16.

[19] Charter of the United Nations, June 26, 1945 art. 94(1), 1 U.N.T.S. 16. The Statute of the International Court of Justice is an annex to the United Nations Charter and forms an "integral part thereof." U.N. Charter, art. 92. The Charter and the Statute have both been ratified by the United States. 59 Stat. 1031, 1055, T.S. No. 993.

[20] William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 267-68 (citing 115 Cong. Rec. 30, 953 (1969)).

[21] *Id.* (quoting Ex. E, 91st Cong., 1st Sess., at VII (Statement of Secretary of State William Rogers) (1969)).

[22] Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, reprinted in S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 60.

had voted against a proposal that would have significantly weakened the "compulsory jurisdiction" clause in the VCCR Optional Protocol.[23]

In hearings before the Senate Foreign Relations Committee, the State Department took the position that the VCCR is "entirely self-executive and does not require any implementing or complementing legislation"[24] so that "[t]o the extent that there are conflicts in Federal legislation or State laws, the Vienna Convention, after ratification, would govern" as the supreme law of the land.[25] The VCCR thus falls within the group of U.S. treaties that achieve full domestic legal effect immediately upon ratification and the terms of which are directly enforceable in the United States courts.[26] The Senate subsequently approved the VCCR and the Optional Protocol on October 22, 1969, unanimously and without reservations.[27] Both agreements entered into force for the United States on December 24, 1969.[28] On March 7, 2005, the U.S. sent the U.N. Secretary General a communication with notice of its withdrawal from the Optional Protocol.

### 2. History of U.S. Compliance with Article 36 Requirements

In the 40 years since its ratification, the United States has consistently relied on the VCCR and its binding enforcement mechanism to safeguard the consular rights of its citizens in other countries. So important is compliance with Article 36 obligations to the functioning of U.S. consulates abroad that "protesting unreasonable delays in consular notification is not discretionary but has long been an integral element of U.S. policy to provide protective consular services to detained Americans overseas."[29] The State Department has informed Congress that "immediate consular access" to Americans detained abroad "is the linchpin. . . . guaranteeing the

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[23] *See id.* at 73 (describing American rejection of a proposed Yugoslav amendment).

[24] Hearing Before the Senate Comm. on Foreign Rel., S. EXEC. REP. NO. 91-9, 91st Cong. at 5 (1st Sess. 1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State).

[25] *Id.* at 24. *See also* Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941) (under the Supremacy Clause, "no state can add to or take from the force and effect" of a ratified U.S. treaty establishing the rights of aliens); Charlton v. Kelly, 229 U.S. 447, 468 (1913) (the "construction of a treaty by the political department of the government, while not conclusive upon a court...is nevertheless of much weight.").

[26] *See* Foster v. Neilson, 27 U.S. 253, 314 (1829); Head Money Cases, 112 U.S. 580, 598-99 (1884) (explaining that a self-executing treaty "is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.").

[27] 115 CONG. REC. 30,997 (Oct. 22, 1969).

[28] Proclamation of Ratification, 21 U.S.T. 77, 185.

[29] U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, January 1, 2001, *available at* http://www.state.gov/s/l/16139.htm (last accessed May 25, 2009).

prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures."[30]

The United States was also the first nation to invoke the VCCR Optional Protocol, following the seizure of the U.S. Embassy in Tehran in 1979.[31] In its submissions to the International Court of Justice, the United States emphasized that Article 36 "establishes rights not only for the consular officer but, perhaps more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others." [32] The ICJ entered a final judgment in favor of the United States on May 24, 1980. The State Department responded by insisting that Iran must comply with the Court's binding judgment.[33]

At home, however, the record of U.S. compliance with Article 36 obligations has been inconsistent, and at times deficient—even in cases that resulted in death sentences. For example, German nationals Karl and Walter LaGrand were arrested in Arizona in 1982, but the German consulate was only notified of their cases ten years later "by the LaGrands themselves, who had learnt of their [Article 36] rights from other sources, and not from the Arizona authorities."[34]

The State Department has endeavored to facilitate domestic compliance with the VCCR, and compliance has improved over time. The State Department's efforts began in 1970 with a letter to all U.S. governors advising them that "the initial responsibility for giving effect to the United States Government's rights and obligations under the Vienna Convention will often rest" with state and local officials.[35] While drawing particular attention to Article 36 and other VCCR provisions "regarding consular notification and access," the letter added that the State Department "do[es] not believe that the Vienna Convention will require significant departures from existing practice within the several states of the United States."[36] By 1986 the Department was sending periodic notices on Article 36 obligations to major law enforcement agencies nationwide, advising them that the "arresting official should in all cases immediately inform the foreign national of his right to have his government notified concerning the arrest/detention" and that if "the foreign national asks that such notification be made, you should do so without delay by informing the nearest consulate or embassy."[37] In 1998 the State Department began circulating a comprehensive manual on consular notification and access requirements to domestic law enforcement agencies. The manual advised these agencies to notify detained

[30] U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International, Political and Military Affairs, Part II, 94th Cong. 6 (1975) (Statement of Leonard F. Walentynowicz).

[31] *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24), *reprinted in* 19 I.L.M. 553 (1980).

[32] Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980, p. 174.

[33] *See U.S. Urges the Iranians to Obey Court Decision*, N.Y. TIMES, May 25, 1980, pg. 9.

[34] LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (Judgment of Jun. 27), para. 22.

[35] Letter of April 13, 1970, from John R. Stevenson, State Department Legal Adviser, to The Hon. Keith H. Miller, Governor of Alaska, page 1.

[36] *Id.* page 2.

[37] U.S. Dept. of State, *If You Have Detained a Foreign National, Read This Notice* (October 1986), page 1. Essentially identical notices were issued on September 1, 1991 and April 20, 1993

foreign nationals of their consular notification right.[38] Furthermore, it described Article 36 obligations as "binding on states and local governments as well as the federal government, primarily by virtue of the Supremacy Clause."[39]

More recently, the State Department has been engaged in an outreach and training effort directed at federal, state, and local law enforcement officials, counsel, and judges. The Department recently completed a new and significantly expanded edition of the Consular Notification and Access manual which includes guidance on many additional consular notification and access scenarios, draft guidelines and standard operating procedures. The manual will be published early next year. In addition, the State Department has been working with the Department of Justice on a proposal to amend the Federal Rules of Criminal Procedure to make it a requirement that a foreign national defendant be given consular information at first appearance before a magistrate. The Departments of State and Justice hope that states will adopt similar rules, using the revised federal rule as a template.

Even before formal ratification of the VCCR, federal regulations were amended to "establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers of this Department [of Justice] on charges of criminal violations."[40] Regulations governing immigration detentions were amended in 1967 to require that "[e]very detained alien" receive notification of his or her right to consular notification.[41] The instructions for a federal agency that most closely conform to Article 36 requirements are found in the Internal Revenue Service manual, which obliges its special agents to "promptly inform" foreign detainees of their right to inform their government and gain consular access and to ensure that "notification is immediately given" to the nearest consulate upon the detainee's request.[42]

Three U.S. states have enacted laws addressing consular notification requirements. The California statute is the most explicit: it requires that "every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country" and that "the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified."[43] In Oregon, police officers who detain a foreigner on grounds of mental illness are required to "inform the person of the person's right to communicate with an

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[38] U.S. Dept. of State, CONSULAR NOTIFICATION AND ACCESS 2 (Jan. 2003), *Summary of Requirements Pertaining to Foreign Nationals*.

[39] *Id.* at 44, *Basis for Implementation.*

[40] Notification of Consular Officers upon the arrest of foreign nationals. 28 C.F.R. 50.5(a) (2008) (32 Fed. Reg. 1040 (1967)).

[41] Apprehension, custody, and detention. 8 C.F.R. § 236.1(e) (2009) (originally enacted as 8 C.F.R. § 242.2(e) (1967) (32 Fed. Reg. 5619 (1967)). See also *United States v. Rangel-Gonzales*, 617 F.2d 529, 532 (9th Cir. 1980) (finding that "[t]he right established by the regulation and in this case by treaty is a personal one.").

[42] U.S. Internal Revenue Service, Internal Revenue Manual §9.4.12.9 (07-30-2004), *Arrest or Detention of Foreign Nationals*, paras. 4-5.

[43] CAL. PENAL CODE section 834(c)(a)(1) (enacted 1999).

official from the consulate of the person's country."[44] No similar provision exists for criminal arrests, except for a general duty of police officers to "[u]nderstand the requirements of the Vienna Convention on Consular Relations and identify situations in which the officers are required to inform a person of the person's rights under the convention."[45] A Florida statute enacted in 1965 required that "the official who makes the arrest or detention shall immediately notify the nearest consul or other officer of the nation concerned,"[46] but this language was amended in 2001 to state only that failure to provide consular notification "shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national's discharge from custody."[47]

Somewhat better developed is the growing body of state policy guidelines, court directives and police patrol manuals establishing procedures to inform foreign defendants of their consular rights. For example, the Wisconsin Department of Justice has issued an instruction that "law enforcement is obligated by the VCCR to follow consular notification procedures" of information and notification without delay if "the arrested subject is a foreign national" and requests notification or is from a mandatory notification country [48] The Texas Attorney General's Office has circulated a magistrate's guide to consular notification, advising that when "foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified" and advising that courts of record offer at arraignment "without delay, to notify the foreign national's consular officials of the arrest/detention."[49] A memorandum from the Michigan Supreme Court has advised state "judicial officials who preside over arraignments or other initial appearances of aliens in court to inquire at that time whether the alien has been provided with consular notification as required by the VCCR...."[50] Some state and local police forces have already incorporated Article 36 requirements into their standard operating procedures.[51] Meanwhile, the recent decision by the Commission on Accreditation for Law Enforcement Agencies (CALEA) mandating a written procedure "assuring compliance with all consular notification and access requirements"[52] is likely to expand the number of police departments that meet their Article 36 obligations.

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[44] OR. REV. STAT. ch. 426.228 (9)(a) (2007).

[45] OR. REV. STAT. ch. 181.642 (2) (2007).

[46] FLA. STAT. ch. 901.26 (3) (1965), Recognition of International Treaties Act.

[47] FLA. STAT. ch. 901.26 (2008), Arrest and detention of foreign nationals.

[48] Wisconsin Dept. of Justice, Guide for Law Enforcement Contacts with Foreign Nationals (Jan. 2008), at 4. *See also* State of Alaska Department of Corrections, Policies and Procedures, Index 811.15 (effective December 1, 1990), at 2 (when a foreign national is "remanded or committed to an institution" the prisoner "must be informed of the right to have his or her government informed of the arrest or detention.")

[49] Office of the Attorney General of Texas, Magistrate's Guide to Consular Notification Under the Vienna Convention (2000), pp. 7-9.

[50] Michigan Supreme Court, SCAO Administrative Memorandum 2002-09 (July 26, 2002), at 2.

[51] See, e.g., Georgia Department of Community Affairs Planning and Management Division, *A Model Law Enforcement Operations Manual* (6th ed. Feb. 1996), S.O.P. 8.1, Arrests of Foreign Nationals; NYPD Patrol Manual, Procedure No. 208-56 (02-28-01), *both available at* <http://users.xplornet.com/~mwarren/compliance.htm> (last accessed May 25, 2009).

[52] CALEA, Standards for Law Enforcement Agencies (5th ed. 2006), Standard 1.1.4.

While there are indications that domestic compliance with Article 36 obligations may be improving, still largely unresolved is the scope of the legal remedies necessary for past and future Article 36 violations. A large body of American legal literature has emerged in the past 15 years that examines this complex issue. Most of the articles fall into one of four broad categories: 1) the importance of accessing consular assistance in serious criminal cases;[53] 2) raising Article 36 claims in litigation;[54] 3) the relationship between international and domestic law,[55] and 4) specific recommendations for remedial action, such as the development of Article 36 advisements akin to *Miranda* warnings and the legislative implementation of U.S. obligations arising under the VCCR Optional Protocol.[56] There is virtual unanimity among legal commentators that the ongoing failure of the United States to provide consistent compliance with Article 36 and meaningful remedies for its violation has profoundly negative consequences, both at home and abroad.[57]

### 3. Domestic and International Litigation of Article 36 Claims

Despite their consistent recognition of the individual and reciprocal rights conferred under the VCCR, federal authorities have long resisted the creation of judicial remedies for the violations of those rights. In response to other governments' concerns in the early 1990s regarding foreign nationals on death row who had not received consular notification, the Department declared that it "does not believe that the VCCR...require[s] that violations of consular notification obligations be remedied through the criminal justice process."[58] In recent

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[53] See, e.g., S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to Consul*, 26 ST. MARY'S L.J. 719 (1995).

[54] See, e.g., Logene Foster & Stephen Dogett, Vienna Convention: New Tool for Representing Foreign Nationals in the Criminal Justice System, THE CHAMPION, Mar. 1997.

[55] See, e.g., Hernan de J. Ruiz-Bravo, Suspicious Capital Punishment: International Human Rights and the Death Penalty, 3 SAN DIEGO JUSTICE J. 379, 386 (1995).

[56] See, e.g., Gregory Dean Gisvold, Note, Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities, 78 MINN. L. REV. 771 (1994) (recommending a uniform Article 36 advisement procedure akin to Miranda warnings); Joshua A. Brook, Note: Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too, 37 U. MICH. J. L. REF. 573 (2004) (suggesting judicial, executive, and legislative remedies); John Quigley, The Law of State Responsibility and the Right to Consular Access, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 39 (2004) (advocating executive enforcement of state violations through lawsuits brought by the Justice Department); Linda E. Carter, Lessons from Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations, 15 DUKE J. COMP. & INT'L. L. 259 (2005) (suggesting compliance with the ICJ decision in Avena through legislative implementation).

[57] See, e.g., *Medellín v. Texas: A Symposium*, 31 SUFFOLK TRANSNAT'L L. REV. 209 (2008); *Symposium: Treaties and Domestic Law After Medellín v. Texas*, 13 LEWIS & CLARK L. REV. 1 (2009).

[58] U.S. Dept. of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2000, Letter from Legal Adviser David R. Andrews to Assistant Attorney General James K. Robinson of the Criminal Division, Department of Justice, with attachments, filed with the First Circuit Court of Appeals in *United States v. Nai Fook Li*, October 15, 1999, Attachment A, page A-1.

## STATEMENT

Nothing of legal relevance has changed since this Court ruled less than five months ago that the State of Texas may proceed with the execution of José Ernesto Medellìn for his part in the gang rape and brutal murders of two Houston teenage girls in 1993. Medellìn seeks relief based not on a change in law, but on the introduction of legislation. Nothing in the Constitution, statute, or case law authorizes relief based on legislation that has been introduced but not enacted—especially not where Congress has taken no action in the over four years since *Avena*, and where there is no remote, let alone reasonable, expectation that both Houses of Congress will approve the legislation. Nor does any rule of law exist to determine how much (more) delay is needed to further confirm that no action is indeed forthcoming.

To hold otherwise would be to license a single member of the House of Representatives to enjoin the administration of criminal justice by a sovereign State. The Court has already held that the President of the United States, alone, cannot give domestic legal effect to *Avena* and override Texas law. *A fortiori*, one member of the House of Representatives cannot do so.

What's more, enactment of legislation giving domestic legal effect to *Avena* would have no impact on Medellìn's case in any event. The ICJ denied Mexico's request to nullify the convictions and sentences at issue in *Avena*. Instead, the

ICJ ordered the United States only to provide "review and reconsideration," "by means of its own choosing," to determine whether the Vienna Convention violation "actually prejudiced" anyone. As Texas has consistently represented to this Court since 2004, Medellìn has already received "review and reconsideration" of his Vienna Convention claim. In his first state habeas proceedings, both the trial court and the Court of Criminal Appeals found that Medellìn "fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment." App. Tab A, at 84a-85a; Tab B, at 33a. Similarly, a federal district court recognized that a Vienna Convention violation requires a showing of actual harm, Tab C, at 84A, and denied *Medellìn* habeas relief accordingly. This Court likewise observed that "Medellìn confessed within three hours of his arrest—before there could be a violation of his Vienna Convention right to consulate notification." *Medellìn v. Texas*, 128 S.Ct., at 1355 n.1. And just two weeks ago, a federal district court again noted that "no prejudice flowed from the alleged Vienna Convention violation." Pet. App., at 7a-14a. The relief sought by Medellìn is thus not only legally baseless but also futile in any event.

## BACKGROUND

### I. The Crime and Arrest.

This Court recited the relevant facts and procedural history in *Medellìn*. 128 S. Ct., at 1354-55. On June 24, 1993, 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena were walking home when they encountered Medellìn and other members of the "Black and Whites" gang. Medellìn attempted to engage Elizabeth in conversation. When she tried to run, Medellìn threw her to the ground. Jennifer attempted to run back and help her friend, but was grabbed by other members of the gang. The gang members raped both girls for over an hour. Then, to prevent their victims from identifying them, Medellìn and his fellow gang members murdered the girls and discarded their bodies in a wooded area. Medellìn was personally rèsponsible for strangling at least one of the girls with her own shoelace.

Five days later, Medellìn was arrested. Within three hours of his arrest, and after receiving *Miranda* warnings, he signed a written waiver and gave a detailed written confession. Local law enforcement officers did not inform Medellìn that, as a Mexican national, he was entitled to notify the Mexican consulate of his detention within three days of his arrest, under the Vienna Convention on Consular Relations.

## II. Criminal Proceedings and Habeas.

The relevant procedural history is likewise detailed in *Medellìn*. *Id.* at 1355-56. After his conviction for capital murder was affirmed on direct review, Medellìn invoked the Vienna Convention for the first time in his first application for state habeas relief. The trial court rejected the claim on two grounds. First, the claim was procedurally defaulted because Medellìn failed to invoke it at trial. Tab A, at 55a. Second, Medellìn was not entitled to relief in any event, because he "fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment." Tab A, at 57a. The Court of Criminal Appeals affirmed.

Medellìn then sought federal habeas relief. The district court held that the state court reasonably found that the Vienna Convention did not prejudice Medellìn's conviction and sentence. Tab C, at 82a-83a. While the case was pending at the U.S. Court of Appeals for the Fifth Circuit, the ICJ in *Avena* directed that the United States "provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the [affected Mexican] nationals," to determine whether the violation of the Vienna Convention "actually prejudiced" any of the nationals. *Avena*, ¶¶14, 121. The Fifth Circuit then denied a certificate of appealability. *Medellìn v. Dretke*, 371 F.3d 270, 281 (5th Cir. 2004).

This Court granted certiorari, but soon thereafter, the President issued a Memorandum to the United States Attorney General ordering state courts to give effect to the *Avena* ruling, based on the President's own authority. The Court subsequently dismissed the petition as improvidently granted. *Medellìn v. Dretke*, 544 U.S. 660, 672 (2005).

Medellìn sought habeas relief in state court pursuant to the President's Memorandum. The trial court denied relief, and both the Court of Criminal Appeals and this Court affirmed, holding that the President could not give domestic legal effect to *Avena* absent an act of Congress. Accordingly, the Court affirmed the judgment of the Court of Criminal Appeals allowing Medellìn's execution to proceed. *Medellìn*, 128 S. Ct. at 1372.

Medellìn subsequently filed habeas petitions in both federal and state courts, arguing that he should be given the opportunity to avail himself of any remedy that Congress might potentially provide in future legislation. The district court denied habeas relief, while noting that "no prejudice" flowed from any Vienna Convention violation. Pet. App., at 7a-14a . The Texas Court of Criminal Appeals held that Medellìn's claims were barred. Tab D, at 4.

## REASONS TO DENY THE RELIEF REQUESTED

Medellìn seeks to delay the effect of this Court's decision in *Medellìn* by filing a petition for certiorari, a request that the Court withdraw its mandate,

an original petition for a writ of habeas corpus, and an application for stay of execution. The State of Texas opposes all of these requests for the reasons stated herein. (The State will respond to the procedural issues uniquely presented by the original petition for a writ of habeas corpus separately.)

## I. THE COURT HAS ALREADY HELD THAT THE STATE OF TEXAS MAY PROCEED WITH THIS EXECUTION—A RULING THAT CANNOT BE UNDONE BY THE PRESIDENT, LET ALONE BY A SINGLE MEMBER OF CONGRESS.

In *Medellìn*, the Court held that neither the *Avena* decision nor the President's Memorandum prevents the State of Texas from proceeding with Medellìn's execution. Medellìn now contends that the Court should delay his execution because a member of the House of Representatives has introduced a bill that, if enacted, would enable him to obtain judicial review of his conviction and sentence for prejudice, in accordance with *Avena*. He further notes that a Texas senator has informed the press that he intends to introduce a bill providing a similar procedural option in state court. He does not contend, however, that any member of the U.S. Senate plans to introduce such legislation. Nor does he argue that either House of Congress is expected to approve it.

The substance of Medellìn's request for relief from this Court flows from the following extreme and unprecedented premise: that a single member of the House of Representatives can effectuate a stay of his execution by doing nothing more than introducing a bill—one that *might* someday impact his conviction and

sentence, but only *if* he can obtain the support of at least 217 other Representatives, a sufficient number of Senators to bring the bill to a vote and pass it, and the President, and even then, only *if* he can then convince a court (as he has repeatedly failed to do to date) that his denial of consular notification actually prejudiced him.

Medellìn makes this argument in the face of this Court's holding less than five months ago that the President alone cannot give legal effect to the *Avena* ruling. There is *a fortiori* no legal authority for the proposition that a single member of the House of Representatives may interfere with a sovereign State's implementation of its criminal laws, when even the President of the United States lacks the same power. *Cf. United States v. Ballin*, 144 U.S. 1, 7 (1892) ("Power is not vested in any one individual, but in [a majority of each House of Congress]"); *see also Raines v. Byrd*, 521 U.S. 811, 829 & n.10 (1997); *Goldwater v. Carter*, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring). The Court has already ruled, in effect, that nothing in the *laws* of the United States prevents the State of Texas from proceeding with Medellìn's execution. But if that is so, then surely Texas cannot be prevented from acting based on the mere possibility that legislation may someday ripen into valid law.

If the Due Process Clause did not prevent Texas from proceeding with Medellìn's execution the day after this Court decided *Medellìn v. Texas*, then

surely nothing has changed simply because a single legislator has introduced a bill a few months later. That is especially so given that Congress has taken no action in the over four years since the ICJ announced its decision in *Avena*, and given that there is no prospect of Congress taking any such action in the future.

What's more, Medellìn's theory of relief would inject profound instabilities into the judicial system. There is no reason to believe that either House of Congress will approve the legislation in *any* amount of time. No rule of law exists to determine how much time courts must give Congress, beyond the over four years that have already passed since *Avena*, before allowing Texas to proceed. No rule of law permits, let alone requires, courts to leave the State of Texas (not to mention the families and friends of the victims) in a state of limbo, based on nothing more than speculation about the future of the political process. Nor does any rule of law imposes any limits on Medellìn's theory of relief. Should this Court endorse Medellìn's theory of relief, nothing will stop future litigants from seeking similar redress based on any number of other proposals that have been introduced in Congress.

* * *

Medellìn falls far short of satisfying the legal standard for granting a stay of execution. He does not demonstrate the denial of a constitutional right that would become moot if he were executed. *See Barefoot v. Estelle,* 463 U.S. 880,

893-94 (1983). Indeed, Medellìn does not assert a constitutional right. Nor is there any support for granting Medellìn's extraordinary request to stay or withdraw the Court's mandate. *See Calderon v. Thompson*, 523 U.S. 538, 550 (1998) ("The sparing use of the power demonstrates that it is one of last resort, to be held in reserve against grave, unforseen contingencies."). When a valid state-court judgment is involved, a federal court may not recall or withdraw its mandate absent a showing of actual innocence or fraud on the court. *Id.* at 558; *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-45 (1944). Medellìn demonstrates neither. The Court has on occasion withdrawn its mandate in order to permit Congress to cure an unconstitutional enactment, without impairing the administration of the government in the interim. *See, e.g., N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 & n.40 (1982) (staying the mandate in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws"); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam) (adopting the same approach to allow the Federal Election Commission to continue operations). But it has never placed a criminal punishment on hold, in the absence of any unconstitutional enactment, in order to allow Congress to affirmatively enact entirely new legislation.

## II. EVEN IF ENACTED, THE PROPOSED LEGISLATION WOULD NOT ALTER THE RESULT IN THIS CASE, BECAUSE MEDELLÌN HAS ALREADY RECEIVED THE REQUIRED "REVIEW AND RECONSIDERATION" AND HAS CONSISTENTLY BEEN FOUND TO HAVE SUFFERED NO PREJUDICE.

Medellìn's request for relief suffers from yet another defect—the legislation would not alter the result in his case, because he has already received the "review and reconsideration" required under the ICJ's ruling in *Avena*. Federal and state courts have repeatedly concluded that Medellìn was not "actually prejudiced" by the denial of timely consular notification. Medellìn first received review and reconsideration of his Vienna Convention claim in his first state habeas proceeding, when the trial court concluded that the violation did not impact the validity of his conviction or sentence. Tab A, at 57a. No court has ever disagreed with that determination. And the State of Texas has explained the implications of that holding at every stage of the proceedings involving Medellìn, including in this Court.[1]

In *Avena*, the ICJ specifically rejected Mexico's request to nullify all convictions and sentences arising from a violation of the Vienna Convention and instead ordered a more modest procedural remedy: that the United States

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1. In the first case heard by the Court, *Medellín v. Dretke*, the State addressed this issue both in its brief in opposition to certiorari, at 14-16, and in its merits briefing, at 15-17. In the second appeal, *Medellín v. Texas*, the State likewise addressed the issue both in its brief in opposition to certiorari, at 4-5, 12-14, and in its merits briefing, at 49-50.

provide, "by means of its own choosing," judicial "review and reconsideration" of the sentences and convictions of the named Mexican nationals. *See Avena*, at ¶¶14, 121-23, 153(9). The "review and reconsideration" would simply determine whether the denial of timely consular notification "caused actual prejudice to the defendant in the process of the administration of criminal justice." *Id.*, ¶121.

Medellìn has already received such "review and reconsideration," on multiple occasions, from multiple state and federal courts. In his First State Habeas Application, the trial court rejected his Vienna Convention claim on several grounds. The court addressed the merits of his claim, and concluded that the violation did not prejudice either his conviction or sentence:

> "The Applicant fails to show that his rights pursuant to U.S. CONST. amends, V, VI, and XIV, were violated and fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. *Ex Parte Barber*, 879 S.W.2d 889, 891-92 (Tex. Crim. App. 1994) (holding that, in order to be entitled to habeas relief, defendant must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment)." Tab A, at 57a.

Accordingly, the court concluded that Medellìn "fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [Medellìn] was provided with effective legal representation upon [his] request; and [his] constitutional rights were safeguarded." *Id.*, at 56a.

The Court of Criminal Appeals affirmed the trial court's order and likewise held that, even if there were a Vienna Convention violation, Medellìn was not prejudiced by it. Tab B, at 33a.

The federal district court reviewing Medellìn's first petition for federal habeas relief similarly considered, and rejected, his claim of prejudice:

> "Even if procedural law and non-retroactivity principles did not mandate the denial of this claim, and the Court were to assume that the Vienna Convention created an enforceable right, [Medellìn] would have to show concrete, non-speculative harm for the denial of his consular rights. . . . Medellìn contends that the Mexican Consul would have taken immediate steps to secure representation for him and would have advised him not to confess to the rape and murder of the two young girls.
>
> . . . [Medellìn] has not shown that [the state court's] determination [concerning prejudice] was contrary to, or an unreasonable application of, federal law . . . . Medellìn's allegations of prejudice are speculative. The police officers informed Medellìn of his right to legal representation before he confessed to involvement in the murders. Medellìn waived his right to advisement by an attorney. Medellìn does not challenge the voluntary nature of his confession. There is no indication that, if informed of his consular rights, Medellìn would not have waived those rights as he did his right to counsel. Medellìn fails to establish a causal connection between the [Vienna Convention] violation and [his] statements." Tab C, at 84a-85a.

And just a few months ago, this Court likewise observed:

> "The requirement of Article 36(1)(b) of the Vienna Convention that the detaining state notify the detainee's consulate "without delay" is satisfied, according to the ICJ, where notice is provided within three working days. *Avena,* 2004 I.C.J. 12, 52, ¶ 97 (Judgment of Mar. 31). *See Sanchez-Llamas v. Oregon,* 548 U.S. 331, 362 [] (2006) (Ginsburg, J., concurring in judgment). Here, Medellìn

> confessed within three hours of his arrest—before there could be a violation of his Vienna Convention right to consulate notification." *Medellìn,* 128 S. Ct. at 1355 n.1.

*See also id.* at 1373 (Stevens, J., concurring) (noting "remote likelihood" that Medellìn suffered any prejudice).

In subsequent federal habeas proceedings, just two weeks ago, the district court remarked, again, that the issue of prejudice had been addressed by the trial court on first state habeas. Pet. App. at 7a-14a.

And just last week, the Court of Criminal Appeals again rejected Medellìn's claim for relief. Tab D, at 4. In a concurring opinion, Judge Cochran rejected Medellìn's claim of prejudice in rather pointed terms:

> "[T]here is no likelihood at all that the unknowing and inadvertent violation of the Vienna Convention actually prejudiced Medellin. This was a truly despicable crime committed by five truly brutal young men who were deadly dangerous to anyone who might find themselves near them. All five were sentenced to death by separate juries after hearing all of the evidence in each of their individual trials. No matter how long the courts of this state, this nation, or any other nation review, re-review, and re-review once again the disgusting facts of this crime and these perpetrators, the result should be the same: These juries reached a reasonable verdict, beyond a reasonable doubt, that a sentence of death was the only appropriate punishment under Texas law." Tab D, at 23-24 (Cochran, J., concurring).

In addition, Judge Cochran specifically addressed Medellìn's contention that a different, better lawyer, paid for by the Mexican consulate, could have introduced sufficient background, character, and "life history" evidence to

convince the jury that a life sentence, rather than the death penalty, was appropriate:

> "This argument might have some plausible intellectual appeal had just one, any one, of [Medellìn's] [four] cohorts not been sentenced to death despite the best efforts of their respective attorneys during their individual trials. [Medellìn] may or may not have been the ringleader of this gang, but he was, at minimum, fully and gleefully involved in the brutal rapes and murders of these two young girls. The evidence at trial showed that he bragged about his gory and sadistic exploits to his friends. The State also put on considerable evidence showing his prior violence and post-offense violence in jail. The jurors heard a great deal of evidence about [Medellìn's] extensive gang-related illegal activities before this crime and how he was expelled from school because of gang activities. No Officer Krupke would ever concluded that [Medellìn's] crimes and those of his cohorts were just the unfortunate product of a sad and sorry upbringing." Tab D, at 20-22 (Cochran, J., concurring).

In all of the numerous federal and state legal proceedings following the denial of Medellìn's first application for habeas relief, no court has ever disagreed with these conclusions. Medellìn has had the benefit of multiple habeas proceedings, and two proceedings before this Court—yet has never impeached the trial court's conclusions during first state habeas that he suffered no actual prejudice as a result of the Vienna Convention violation, either in conviction or in sentencing. There is no reason to believe that a specially-created procedure for raising the same arguments, based on the same evidence, seven years later would change the results of Medellìn's conviction and sentence.

Accordingly, nothing in the *Avena* ruling, as a matter of either U.S. or international law, stands in the way of the legal authority of the State of Texas to proceed with the execution of Medellìn.

* * *

As explained, proceeding with Medellìn's execution fully complies with international law. Moreover, this Court has already ruled that ICJ decisions are not U.S. law and therefore not binding in U.S. courts. Nevertheless, the State of Texas acknowledges the international sensitivities presented by the *Avena* ruling, as well as the observation of Justice Stevens in his concurring opinion that "[t]he cost to Texas of complying with *Avena* would be minimal." *Medellìn*, 128 S. Ct., at 1374-75 (Stevens, J., concurring).

For this reason, the State of Texas will take certain measures in future proceedings. Medellìn has already received review and reconsideration of his claims under the Vienna Convention. However, some defendants currently incarcerated in Texas and subject to *Avena* may not have received "review and reconsideration" of their claims of prejudice under the Vienna Convention on the merits. Accordingly, and as an act of comity, if any such individual should seek such review in a future federal habeas proceeding, the State of Texas will not only refrain from objecting, but will join the defense in asking the reviewing

court to address the claim of prejudice on the merits, as courts have done for Medellìn.

## CONCLUSION

Medellìn's petition for writ of certiorari, motion to recall and stay the mandate, and application for stay of execution should be denied.

Respectfully submitted,


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August 4, 2008

# Appendix

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# A

IN THE 339TH DISTRICT COURT OF
HARRIS COUNTY, TEXAS

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Cause No. 675430-A

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EX PARTE

JOSE ERNESTO MEDELLIN,

*Applicant*

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## RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus, the Respondent's Original Answer, the evidence elicited at the applicant's capital murder trial in cause no. 675430, affidavits submitted in cause no. 675430-A, and official court documents and records, makes the following findings of fact and conclusions of law:

## FINDINGS OF FACT

1. The applicant, Jose Ernesto Medellin, was indicted and convicted of the felony offense of capital murder in cause no. 675430 in the 339th District Court of Harris County, Texas.

2. The applicant was represented during trial by counsel Jack Millin, now deceased, and Linda Mazzagatti.

3. On September 20, 1994, the trial court assessed the applicant's punishment at death by lethal injection after the jury affirmatively answered the first two special issues and negatively answered the third special issue.

4. The Court of Criminal Appeals affirmed the applicant's conviction in an unpublished opinion delivered March 19, 1997. *Medellin v. State*, No. 71,997 (Tex. Crim. App. Mar. 19, 1997) (not designated for publication).

*First Ground—ineffective assistance of appellate counsel re Batson claim: Fourth Ground—Batson claim:*

5. The Court finds that, during the State's voir dire examination of prospective juror Elizabeth Ann Berry, she stated that both of her brothers had been arrested for drug-related offenses; that both have had a "number of cases;" that one was "serving time now;" that they had been in and out of the prison system often in the last five or six years; and, that the cases were prosecuted in Harris County (R. XX - 181-2).

6. The Court finds that, on the juror questionnaire, prospective juror Elizabeth Berry described a defense attorney as the underdog, always fighting, and a prosecutor as "on the attack" (R. XX - 184).

7. The Court finds that the State exercised a peremptory strike at the conclusion of the voir dire examination of prospective juror Elizabeth Berry, and the applicant made a *Batson* challenge (R. XX - 226).

8. The Court finds that the trial court requested that the State, "regardless of a prima facie showing," offer an explanation for the strike of prospective juror Elizabeth Berry, and that the State explained that the strike was based upon Berry having two brothers involved in drugs and serving time in prison; that one brother had been in prison on numerous occasions; and, that one brother was presently on parole and the other brother was presently in custody (R. XX - 227-8).

9. The Court finds that the State, in explaining its strike of prospective juror Elizabeth Berry, noted Berry's characterization of the prosecution as on the attack and the defense as the underdog and stated that, as a result, the State would have the perception during the trial that Berry viewed the applicant as the underdog and the prosecutor as a "wild mongrel" on the attack (R. XX - 228).

10. The Court finds that the State, via prosecutor Mark Vinson, stated that he had an appreciation of blacks serving on juries, because he was a black male who grew up during the 1940's, 50's, 60's, 70's, 80's, and 90's (R. XX - 229).

11. The Court finds that the trial court stated that it did not believe that a *prima facie* showing had been made at that time, but the trial court found that the State's reasons for striking prospective juror Elizabeth Berry were race-neutral based on Berry's demeanor and her responses and her juror questionnaire (R. XX - 230).

12. The trial court denied the applicant's *Batson* motion and informed the applicant that the court would reconsider the motion if the applicant wanted to reurge it at the end of jury selection (R. XX - 230).

13. The Court finds that the trial court noted, after denying the applicant's *Batson* challenge, that the jury was then composed of nine people, including a black female, a black male, an Hispanic male, and an Hispanic female; that there was no indication of gender bias; and, that the jury composition at that time was a black female, two white females, an Hispanic female, an Hispanic male, two white males, and a black male (R. XX - 230-1).

14. The Court finds that, during the State's voir dire examination of prospective juror Rafael F. Rodriguez, the State noted that there was hesitation on Rodriguez's part regarding the death penalty when questioned by the trial court and Rodriguez stated that he had not given the death penalty much thought (R. XXI - 71).

15. The Court finds that, during the State's voir dire examination of prospective juror Rafael Rodriguez, his responses concerning his thoughts on the death penalty were unclear and ambiguous (R. XXI - 90, 92-6).

16. The Court finds that, at the conclusion of the voir dire of prospective juror Rafael Rodriguez, the State exercised a peremptory strike on Rodriguez and the applicant made a *Batson* challenge, noting that the applicant and Rodriguez are both Hispanic (R. XXI - 115-6).

17. The Court finds that, at the conclusion of the State's voir dire of prospective juror Rafael Rodriguez and after the applicant's *Batson* challenge, the trial court made a finding of a *prima facie* case, and the State gave the following explanations for the peremptory strike of Rodriguez: that he had a great deal of hesitation when he was talking about the death penalty with the trial court; that the State still did not have a full understanding of Rodriguez's position on the death penalty; and, that

Rodriguez had stated that he was absolutely in favor of the death penalty without any compunctions if the victim were a relative of Rodriguez (R. XXI - 117).

18. The Court finds that the State also noted that prospective juror Rafael Rodriguez's theological and philosophical reply during voir dire examination concerning "turning the other cheek" indicated that Rodriguez would be "looking to turn the other cheek in this case..." (R. XXI - 118).

19. The Court finds that the trial court found that the State's explanation for the peremptory strike of prospective juror Rafael Rodriguez was a racially neutral explanation and the trial court denied the applicant's *Batson* challenge (R. XXI - 118).

20. The Court finds that the applicant, on August 17, 1994, presented a written motion to strike the jury panel based, in part, on the State's exercising thirteen preemptory strikes against the following prospective jurors, as noted by the applicant: (1) Kirven O'Neal Tillis, black male; (2) Mary Freeman, white female; (3) Kathy Felder, black female; (4) Bernard Richardson, black male; (5) Walter Wynn Martin, white male; (6) Andra McCoy, black male; (7) Marie Clark, white female; (8) Vastine Dickie, black male; (9) Christine Rossi, white female; (10) Raford Earl Gresham, white male; (11) Porfirio Rodriguez, Jr., Hispanic male; (12) Elizabeth Ann Berry, black female; and (13) Rafael Rodriguez, Hispanic male (R. I - 264-5) (R. XXVI - 11).

21. The Court finds that, on August 17, 1994, the applicant presented the following argument in support of its motion:

> And the State exercised six of it's (sic) peremptory challenges against black venire members and eight of it's (sic) peremptory challenges against males and the State exercised two of it's (sic) peremptory challenges against Hispanic male venire members. And this also includes a Batson Challenge. And, of course, the Court – I agree that whatever Batson challenges were preserved during the proper objection at the time would be the Batson Challenges that would be considered. But we are bringing to the Court's attention that these persons have been struck and that we would suggest to the Court that it's a prima facie case of discrimination for the State's use of peremptory challenges and we would suggest to the Court that the motion – that our Motion to Strike the Panel be also granted on this premise.

[R. XXVI - 11-2).

22. The Court finds that the State, in response to the applicant's August 17, 1994 argument in support of the applicant's motion to strike the panel, informed the trial court that the record reflected that the final jury was a "melting jury" and that the thirteen noted peremptory strikes were racially neutral (R. XXVI - 12-3).

23. The Court finds that the trial court denied the applicant's motion to strike the jury panel by written order on August 19, 1994 (R. I - 267).

24. The Court finds that the State exercised thirteen peremptory strikes and that a review of the State's peremptory strikes, as noted in the applicant's motion to strike the jury panel, shows that the State struck three white females and two white males, comprising almost fifty percent of the State's thirteen total peremptory strikes (R. I - 264-5) (R. XXVI - 11-2).

25. The Court finds, based on personal recollection, that the prosecutor in the applicant's case was also the prosecutor in the 1993 Harris County capital murder trial of Kenneth Wayne Morris; that the trial judge in the applicant's case and the trial judge in Kenneth Wayne Morris' case was the same person; that the prosecutor offered an explanation for a peremptory strike during jury selection in Kenneth Wayne Morris' case; that the trial judge found the prosecutor's explanation to be racially neutral in Kenneth Wayne Morris' case; and, that the trial judge noted in Kenneth Wayne Morris' case that the same prosecutor had tried a capital case three months earlier and that there were either three or four black jurors. *See Volume 4, page 115, appellate record of The State of Texas v. Kenneth Wayne Morris, cause no. 597997.*

26. The Court finds that the Court of Criminal Appeals, on direct appeal of the capital murder conviction of Kenneth Wayne Morris, overruled Morris' claim that the trial court improperly based her ruling on the absence of purposeful discrimination by the same prosecutor in another criminal trial and stated, "A ruling on a *Batson* objection is a credibility determination. Because the trial judge determines the issue of the prosecutor's credibility, it is not error for the court to consider its past experiences with a prosecutor in determining his credibility." *Morris v. State*, 940 S.W.2d 610, 612 (Tex. Crim. App. 1996).

*First Ground - ineffective assistance of appellate counsel re Motion to Preclude State from Seeking Death Penalty*:

27. The Court finds that the applicant, prior to trial, filed a written motion too preclude the State from seeking the death penalty and that the clerk's file-mark on the face of the motion notes that the motion was filed at 2:00 p.m. on July 29, 1994 (R. I - 95-107).

28. The Court finds that the face of the applicant's written motion to preclude the State from seeking the death penalty shows the following stamp:

On The Record
Date: 9/9/94
Ct. Reporter: Wong Lee
(R. I - 108).

29. The Court finds that the written order accompanying the applicant's motion to preclude the State from seeking the death penalty is signed by the Honorable Caprice Cosper, the presiding judge of the 339th District Court and that there are initials placed on the line next to "GRANTED" (R. I - 108).

30. The Court finds, based on the appellate record, that the trial court ruled on pre-trial motions and verbally denied the applicant's objection to preclude the State from seeking the death penalty (R. XXVII - 9).

31. The Court finds, based on its personal recollection, that the written order notation on the applicant's motion to preclude the State from seeking the death penalty is an inadvertent error.

32. The Court finds that the applicant's written motion to preclude the State from seeking the death penalty and its accompanying order were a request for the trial court

to preclude the State from seeking the death penalty, not a motion requesting that the State be precluded from carrying out a constitutionally valid death sentence after such sentence is assessed.

33. The Court further finds, based on the applicant's trial in which the State sought the death penalty and on the applicant's resulting death sentence, that the inadvertent error on the written order accompanying the applicant's motion to preclude the State from seeking the death penalty was rendered moot by the applicant's trial and subsequent sentence of death.

*Second Ground—ineffective assistance of counsel re contacting probation officer*:

34. The Court finds that evidence was presented during the guilt-innocence phase of the applicant's trial showing that the applicant and his co-defendants, Peter Cantu, Efrain Perez, Derrick Sean O'Brien, and Raul Villarreal, took turns sexually assaulting the complainant and Jennifer Ertman (R. XXXII -948-9); that the applicant participated in the strangulation deaths of the complainant and Ertman after the repeated sexual assaults (R. XXXII - 949); that the applicant afterwards laughed and bragged about his part in the sexual assaults and murders (R. XXIX - 389-90); that the applicant said that he "fucked one of the girls in the pussy" and then "fucked her in the ass ;" (R. XXIX - 391-2); that the applicant said that he made one of the girls give him a "blow job" and that he hit her on the top of her head when she would not close her mouth (R. XXIX - 395, 425); and, that the applicant later showed Christina Cantu his underwear with blood on it and stated that he could not believe that one of the girls was telling the truth when she said that she was a virgin; that the appli-

cant, who admitted having sex with both girls, seemed proud that he "opened" the girl who was a virgin, and that he "dirtied" the inside of the girl when he was first entering her; that the applicant said they had fun; and, that the applicant took part of the property stolen from the murdered girls (R. XXIX - 393-4, 397-401, 405, 422, 424-5) (R. XXX - 477-8, 533-4).

35. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant was suspended from school at the age of fourteen in 1990; that he was placed in an alternative school for repeated misbehavior and misconduct; and, that he was not able to function at the alternative school and was expelled from the school district for the remainder of the school year (R. XXXIV - 76-8).

36. The Court finds that, during the punishment phase of the applicant's trial, the State further presented evidence that the applicant called a female teacher a whore, used profanity and defied the rules (R. XXXIV - 7-13).

37. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant made threats of physical violence toward two adult principals when the applicant was a sixteen-year old student in 1992; that he was confrontational, aggressive, and physically resisted the principals when they attempted to calm the applicant; that he screamed profanities at another student; and, that the applicant stated that life did not mean anything to him; he would be on television or in the newspaper for killing someone and jail did not scare him (R. XXXIV - 17-64).

38. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant had been suspended several times from

school by 1992; that he was expelled from school after being in a gang-related fight; and, that the applicant never altered his behavior while attending school before he was permanently removed (R. XXXIV - 64-9).

39. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant was referred as a juvenile on a weapons charge after he was detained as a result of an auto theft and after he was found in possession of a .38 revolver on January 4, 1992 (R. XXIV - 110-54), and that the applicant was charged with the offense of carrying a weapon on July 18, 1992, after a .38 weapon was found partially under the applicant's car seat on the floorboard of the car next to two live rounds of .38 SP ammunition, a more powerful round than a normal .38 round (R. XXXIV - 179-81)

40. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the police talked to the applicant outside of the emergency room at Memorial Northwest Hospital after the applicant and Peter Cantu accompanied the gunshot Efrain Perez to the hospital on June 6, 1993; that the applicant and Cantu were uncooperative, belligerent, abusive, sarcastic and vulgar; and, that the applicant changed his story concerning the shooting several times (R. XXXIV - 197, 216-8).

41. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that a shank was found during a search of the applicant's one-man cell in the Harris County Jail on July 1, 1993 (R. XXXIV - 84-90), and that an L-shaped metal pipe, capable of causing serious bodily injury and death, with a sharpened end was also found in the mattress in the applicant's lock-down cell (R. XXXIV - 225-7).

42. The Court finds, based on the appellate record, that information, if any, that the applicant was punctual for appointments with his juvenile probation officer and did not cause his probation officer any problems is inconsequential in light of the overwhelming evidence of the applicant's prior history and in light of the brutality of the offense which the applicant committed.

43. The Court finds, based on the appellate record, that information, if any, that the applicant presented no problems for his probation officer does not establish that the applicant does well when supervised and does not establish that such evidence is indicative of the applicant's expected behavior in prison if he received a life sentence, in light of the extensive evidence showing the applicant's repeated illegal activities and inability to function in structured environments, including jail.

*Second Ground—ineffective assistance of counsel re parole eligibility instruction*:

44. The Court finds that, during the applicant's trial, trial counsel stated that counsel did not want the trial court to inform the jury of the applicant's parole eligibility in the event of a life sentence because counsel's previous experience in capital cases showed that polled jurors thought that a life sentence was truly a life sentence (R. V. XXVII - 12-3).

45. The Court finds that the issue of parole eligibility was not a matter for the jury's consideration at the time of the applicant's September, 1994 capital murder trial, and the trial court was not required to instruct the jury concerning parole eligibility in a capital case. *Martinez v. State*, 924 S.W.2d 693 (Tex. Crim. App. 1996); *Rhoades v. State*, 934 S.W.2d 113 (Tex. Crim. App.

1996) (citing *Smith v. State*, 898 S.W.2d 838, 846 (Tex. Crim. App. 1995)).

*Third Ground—Vienna Convention*:

46. The Court finds that the applicant did not object pre-trial or during trial to any violation of the Vienna Convention on Consular Relations which grants a foreign national who has been arrested, imprisoned or taken into custody a right to contact his consulate and requires the arresting government authorities to inform the individual of this right "without delay." Vienna Convention, art. 36(1) (b), 21 U.S.T. at 100-101; 595 U.N.T.S. at 292.

47. The Court finds that testimony during the applicant's trial and the applicant's statement reflect that the applicant was born in Mexico, but lived most of his life in the United States; that he spoke, read and wrote the English language; that he attended Houston public schools beginning with elementary school; that he initially did well in elementary school; that his family and friends lived in the United States; that his father had been gainfully employed since his arrival in the United States; that his mother was presently employed; and that the applicant had been employed in the United States while going to Houston schools (R. XXXV - 279-92) (R. XXX - 652, 670).

48. The Court finds that the applicant's father testified that they had lived in the United States for fifteen years and that both he and the applicant's mother had a "green card" (R. XXXV - 279-80, 288).

49. The Court finds that the applicant's school records contain the notation "516396627" under social security number for the applicant.

50. The Court finds, based on the appellate record, that there was no testimony presented during the applicant's trial that he was not a United States citizen; that the applicant told anyone during his detention that he was a Mexican national; that he requested assistance from the Mexican consulate; or, that he was prevented from requesting assistance from the Mexican consulate.

51. The Court finds that it is a reasonable inference that the applicant was familiar with the laws and procedures of the country and state in which he had lived almost his entire life and that the applicant was familiar with the criminal justice system based on his prior criminal history.

52. The Court finds that the applicant was informed of his *Miranda* rights prior to giving a statement admitting participation in the offense (R. XXX - 633-40) (R. XXXII - 942-5).

53. The Court finds that the Court of Criminal Appeals has held that a defendant does not have standing to advance a claim that his death sentence violated the United Nations Charter, stating that "...treaties operate as contracts among nations. Therefore, it is the offended nation, not an individual, that must seek redress for a violation of sovereign interests." *Hinojosa v. State*, No. 72,932 (Tex. Crim. App. Oct. 27, 1999).

54. The Court finds that the Court of Criminal Appeals has also held that treaties do not constitute "laws" for the purposes of TEX. CODE CRIM. PROC. art. 38.23; specifically, that "the Vienna Convention Treaty illustrates well the proposition that Article 38.23 is not a suitable enforcement mechanism for international treaties." *Rocha v. State*, 16 S.W.3d 1, 19 (Tex. Crim. App. 2000).

55. The Court finds that federal courts have found that a violation of the provisions of the Vienna Convention will not require reversal of a criminal conviction or other judgment, in the absence of a showing that the defendant was actually harmed by the violation. *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 487 (1997); *United States v. $69,530.00 in United States Currency*, 22 F.Supp.2d 593, 595 (W.D.Tex. 1998).

*Fifth Ground—Brady issue*:

56. The Court finds that, during the guilt-innocence phase of the applicant's trial, the State presented testimony from Joe Cantu, the brother of the applicant's co-defendant Peter Cantu, and from Christina Cantu, Joe Cantu's wife, about the admissions the applicant made concerning his part in the capital murder (R. XXIX - 366-373, 383-425) (R. XXX - 490-540).

57. The Court finds, according to the credible affidavit of Gail Hays, Harris County District Attorney's Office Investigator, that Hays was assigned as an investigator to the 263rd District Court during 1994; that Assistant District Attorney Marie Munier was the chief of the 263rd District Court and was the prosecutor in the trial of the applicant's co-defendant Efrain Perez at that time; that Hays talked with witnesses Christina and Joe Cantu; that Hays made no deals or agreements with Christina and Joe Cantu in exchange for their cooperation or testimony as witnesses; that Hays did not promise the Cantus any reward money in exchange for their cooperation or testimony; and, that Hays did not promise "protection" to either Christina or Joe Cantu.

58. The Court further finds, according to the credible affidavit of Gail Hays, that Hays was aware that Christina Cantu was pregnant, but Hays was not aware of any miscarriage and was never informed of any alleged beating of Christina Cantu; that Hays became aware that Joe Cantu had been arrested prior to trial when Christina Cantu telephoned Hays and gave her such information; that Hays' understanding was that Joe Cantu made a statement about "blowing up" his place of employment after having an argument at work and Joe Cantu was subsequently arrested; that Hays informed Assistant District Attorney Marie Munier of Joe Cantu's arrest either the night Hays learned he had been arrested or the next business day; that Hays had no knowledge of any events concerning Joe Cantu's arrest after that time; that Hays did not recommend a lawyer or give any lawyer's name to either Joe or Christina Cantu; that Hays made no promises concerning Joe Cantu's case; and, that Hays was not aware of the disposition of Joe Cantu's arrest until December, 1999.

59. The Court finds, according to the credible affidavit of Harris County Assistant District Attorney Marie Munier, the prosecutor in the case of the applicant's co-defendant Efrain Perez, that Munier learned that Joe Cantu had been arrested prior to trial; that Munier has no specific recollection of informing Assistant District Attorneys Mark Vinson or Terry Wilson of Joe Cantu's arrest; that Munier made no deals or agreements with Joe or Christina Cantu involving their testimony in the trials or involving Joe Cantu's arrest; that Munier took no action involving Joe Cantu's arrest or the disposition of his case; that Munier was aware that Joe Cantu's case was dismissed prior to the trials of the applicant and co-defendant Efrain Perez; that Munier made no promises or assurances to either Joe or Christina Cantu concern-

Trial counsel: Under Brady.

The State: Okay.

Trial court: Okay.

Tr. Vol. 26 at 30-31. In that hearing, the parties also discussed the fact that the State had assured that it made no agreements with the witnesses in this case. Tr. Vol. 26 at 32-33.

On state habeas review, Medellin claimed that the State failed to disclose the arrest of Joe Cantu for making terroristic threats.[24] At trial, Joe Cantu and his wife Christina related statements made to them by Medellin after he participated in the rape and murder of the two young victims. Joe and Christina Cantu's testimony helped establish Medellin's precise role in the girls' death. Trial counsel asked Joe Cantu at trial whether he had entered into any deal in exchange for his testimony:

Trial counsel: Have you, Mr. Cantu, received anything from the State in the way of any assistance, anything like that, to secure your presence as a witness?

Mr. Cantu: I don't understand your question.

Trial counsel: Have you been given anything by the State in order for you to be available to testify?

Mr. Cantu: Just that I won't be prosecuted for anything that I say.

[24] Joe Cantu was the brother of one of Medellin's co-defendants and a former member of Medellin's gang.

Trial counsel: And did the State talk to you about the possibility of you being prosecuted for you pawning that stolen necklace?

Mr. Cantu: No.

Trial counsel: They did make an agreement not to prosecute you if you did testify?

Mr. Cantu: They didn't say nothing about that.

The State: We made no agreement with this—

Trial court: Approach the bench.

(WHEREUPON, there was a discussion held off the record outside the hearing of the court reporter)

Trial counsel: So, anyway, Mr. Cantu, you testified that it was agreed that you wouldn't be prosecuted for anything you said today; is that right?

Mr. Cantu: Not today but in the previous—

Trial counsel: Okay. In the previous—you've already testified in several trials; is that right?

Mr. Cantu: Right.

Tr. Vol. 30 at 544-45. Medellin argues that Joe Cantu lied; he contends that evidence produced during the state habeas proceedings shows that the State entered into a deal to secure Mr. Cantu's testimony.

Medellin bases his claim on an affidavit from Christina Cantu. Christina Cantu's affidavit describes information about her and her husband's testimony that was not presented to the defense. Christina Cantu describes how she asked the prosecution about the pos-

sibility of a reward in exchange for their testimony, but states that the police told her that the available award money in this case went to another individual. Christina Cantu also states that the State promised her "protection as a witness," but that "never occurred." Because of that, she was "physically beaten at school several times." Christina Cantu also provides details about Joe Cantu's arrest for making terroristic threats:

> Around the time that Jose Medellin went to trial, my husband, Joe Cantu, was arrested for threatening to blow up his place of employment, American Plasma. Joe's brother, Rudy Cantu, informed me of this arrest. I contacted Gail Hayes of the Harris County District Attorneys Office and she stated she was aware of Joe's arrest. Joe was in jail for two days. When he was released he informed me that he spoke with Gail Hayes and that she contacted an attorney for him. I know that Joe went to court one time on this case, but I do not believe he was ever charged or paid a fine. I have never informed anyone about Joe's arrest.

(Docket Entry # 12, Exhibit E). Medellin supports the information contained in Christina Cantu's statement with an affidavit from his trial counsel, Linda Mazzagatti. Trial counsel states that

> With respect to Joe Cantu and Christina Cantu, [current federal habeas counsel] asked me whether I remembered receiving any information, from the District Attorney's Office or elsewhere, that Jose Cantu was arrested for threatening to blow up his place of employment. I have no independent memory of ever learning such information, and my records do not reflect such information.

(Docket Entry # 12, Exhibit G). An investigator's affidavit indicates that the State filed charges against Joe Cantu on June 23, 1994, and then dismissed those charges due to insufficient evidence shortly before Medellin's trial. (Docket Entry # 12, Exhibit I).

Medellin argues that the existence of a deal between the State and Joe Cantu requires reversal of his conviction. Medellin states that

> Joe Cantu's testimony in particular appeared to be credible because he testified against his brother and friends, for no discernable reason. However, had the jury learned that Joe Cantu and Christina were expecting "witness protection," considering the possibility of a reward, currently charged with a criminal offense and represented by an attorney secured by the prosecutors, reasons for the Cantu's testimony. Clearly, such impeachment information was "material" in this case.

(Docket Entry # 12 at 39-40).

In state habeas court, the State produced an affidavit from the prosecutor in this case. The prosecutor stated that he did not enter into any agreements with the Joe or Christina Cantu in exchange for their testimony. State Habeas Record at 108. The prosecutor stated that "I was not involved in Joe Cantu's misdemeanor case and had nothing to do with the ultimate disposition of his case." State Habeas Record at 108. The prosecutor affirmed that he made no promise to the Cantus for a reward in exchange for their testimony. State Habeas Record at 108. Marie Munier, a prosecutor from one of Medellin's co-defendants also submitted a statement wherein she related that she knew about Joe Cantu's arrest, but did not make any deals with him in exchange for his testimony. State Habeas Record at 111. That prosecutor

stated that she made no promise for a reward in exchange for Joe and Christina Cantu's testimony. State Habeas Record at 111.

The State also submitted an affidavit from Gail Hayes, an investigator who worked for the Harris County District Attorney's Office. Ms. Hayes stated that in her investigation of this case "Joe and Christina Cantu asked me about the Crime Stoppers reward money. Subsequently, I learned that the Crime Stoppers money had been given to Christina's sister. I never promised or made assurances to either Joe or Christina Cantu that they would receive any reward money in exchange for cooperation or testimony." State Habeas Record at 114-15. Ms. Hayes also stated that she did not promise any protection or deal to Mr. or Mrs. Cantu in exchange for their testimony. State Habeas Record at 115. Ms. Hayes also addressed the question of Joe Cantu's arrest:

> Prior to trial, Christina Cantu telephoned me and told me that Joe Cantu had been arrested. Joe Cantu was working at a plasma clinic, got into an argument with someone, made a statement about "blowing the place up," and was subsequently arrested. I informed Marie Munier about Joe Cantu's arrest either that night or the next business day. I have no knowledge of any events concerning Joe Cantu's arrest after that time. I did not recommend a lawyer or give any lawyer's name to either Christina or Joe Cantu. I made no promises concerning the disposition of Joe Cantu's case or concerning his incarceration. I was not aware of the disposition of Joe Cantu's arrest until I talked with Assistant District Attorney Roe Wilson in December, 1999.

State Habeas Record at 115. The State also submitted an affidavit from Joni M. Vollman, the prosecutor in Joe

Cantu's terroristic threat case. That prosecutor testified that the State did not make any deal with Joe Cantu in exchange for dismissing the charges against him. Instead, the State dismissed the terroristic threat case for a lack of evidence. State Habeas Record at 172. This testimony is confirmed by a copy of the State's Motion to Dismiss in that case. State Habeas Record at 220. The motion indicates that the charges were dismissed for "insufficient evidence." State Habeas Record at 220.

The state habeas court rejected Medellin's claim that the State violated his constitutional rights by not disclosing material exculpatory information prior to trial. The state habeas court reviewed the affidavits submitted by the State and found each to be credible. State Habeas Record at 210-21, ¶57-62. Finding the information contained in those affidavits did not indicate the existence of any deal between the State and Joe Cantu that resulted in the dismissal of his misdemeanor charge, the state habeas court issued the following legal conclusion:

> The applicant fails to show that there was any deal between the State and Joe and Christina Cantu; thus, the applicant fails to show that the State did not disclose material evidence, i.e., a non-existent agreement between Joe and Christina in exchange for their testimony during the applicant's trial. The applicant fails to show that the State did not disclose a non-existent agreement or any alleged favorable and material information in the instant case. United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976); United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985) (holding that evidence is material where there is a reasonable probability that, if disclosed, result of the proceeding would have been different). The applicant fails to show that he was

denied due process under U.S. Const. amend. XIV and Tex. Const. art. 1, § 10.

State Habeas Record at 217-18 ¶18. Medellin is entitled to habeas relief if the state court's rejection of his claim was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). Medellin has failed to support his AEDPA burden with respect to this claim.

B. *Legal standard*

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also Little v. Johnson*, 162 F.3d 855, 861-62 (5th Cir. 1998), *cert. denied*, 526 U.S. 1118 (1999). There are three elements required for a valid *Brady* claim: (1) the prosecution must suppress or withhold evidence, (2) which is favorable to the defense, and (3) material to either guilt or punishment. *See United States v. Lowder*, 148 F.3d 548, 550 (5th Cir. 1998); *In re Smith*, 142 F.3d 832, 836 (5th Cir. 1998); *East v. Johnson*, 123 F.3d 235, 237 (5th Cir. 1997). Evidence is "material" under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different. *See Williams v. Puckett*, 283 F.3d 272, 279 (5th Cir. 2000), *cert. denied*, __ U.S. __, 123 S. Ct. 504 (2002).

C. *Failure to prove the existence of Brady material*

The thrust of Medellin' argument is that the State should have disclosed the existence of a deal wherein Joe Cantu's terroristic threat charge would be dropped in

exchange for his testimony. Yet Medellin has never presented concrete evidence that such an agreement existed. Instead, Medellin rests his argument on the speculation that the State dismissed that charge as part of a secret deal. "Such speculation does not support a *Brady* claim." *Hughes v. Johnson*, 191 F.3d 607, 630 (5th Cir.1999), *cert. denied*, 528 U.S. 1145 (2000); *see also United States v. Dierling*, 131 F.3d 722, 736 (8th Cir. 1997) ("Mere speculation that the government had exculpatory evidence is an insufficient basis for a Brady claim . . . ."), *cert. denied*, 523 U.S. 1066 (1998); *United States v. Van Brocklin*, 115 F.3d 587, 594 (8th Cir. 1997) ("Mere speculation that materials may contain exculpatory evidence is not, however, sufficient to sustain a Brady claim."), *cert. denied*, 523 U.S. 1122 (1998). Medellin's claim is based on nothing more than insinuation. Medellin has not presented any factual allegation that would call into doubt the state habeas court finding that there was no deal with Joe Cantu.

Medellin's argument rests largely on the supposition that there must have been a deal because the State did not try Joe Cantu after his misdemeanor arrest. This argument fails to acknowledge the record evidence that strongly shows that charge was dismissed for insufficient evidence. Medellin has not produced any clear and convincing evidence that would show otherwise, and has failed to produce any competent summary judgment evidence that would demonstrate the existence of a "deal," much less the suppression of a "deal" by the State. Habeas relief is unavailable on *Brady* claims based only on unsupported inferences.

Further, habeas relief is unavailable on the claim that the State failed to divulge Joe Cantu's arrest, independent of any deal. Through pretrial motions, the defense requested that the State provide information about the

arrest record of its witnesses. However, in the pretrial hearing the defense agreed that the State would only turn over information about felony arrests and convictions. Tr. Vol. 26 at 28-31. It is undisputed that Joe Cantu had been arrested for a *misdemeanor* charge. As the defense agreed to the limitation of disclosure to felony offenses and convictions, Medellin cannot complain now that he did not know about Joe Cantu's arrest.

*D. Failure to prove materiality*

Even accepting as true Medellin's claim that the State failed to disclose information concerning Joe Cantu's arrest, his "deal," and the Cantus' request for a reward from Crime Stoppers and physical protection, he has failed to show materiality under *Brady*. The materiality standard for *Brady* claims focuses on whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The failure to provide the defense with the challenged information, insofar as it is correct, did not "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *see also Strickler v. Greene*, 527 U.S. 263, 290 (1999) (fording evidence to be not material if there is only "a reasonable possibility that either a total, or just a substantial, discount of [a witness's] testimony might have produced a different result").

Medellin is correct in noting that the State placed great importance on Joe and Christina Cantu's testimony at trial. Nonetheless, they did not come before the jury unblemished. Trial testimony made the jury aware that the both had long participated in gang activity. Joe had

been a member of the same gang as Medellin; Christina belonged to the "Heights" gang whose primary objective was "[s]tealing cars, jumping people." Tr. Vol. 29 at 433. The jury knew that Joe and Christina Cantu had destroyed physical evidence related to the murders and had pawned some of the victims' jewelry. The jury would not be surprised at the production of a criminal arrest record or at the presence of additional motives for testifying. Even so, the jury also knew that Joe Cantu agreed to testify against his own brother and that the Cantus had reasons to come forward other than for personal gain. In other words, the introduction of the information that Medellin claims was suppressed would have had little impeachment value.

In addition, substantial and convincing evidence of Medellin's role in the murders existed independent from the testimony from Mr. and Mrs. Cantu. A member of the gang who left before they began raping the girls placed Medellin at the scene of the murders. Tr. Vol. 28 at 235-37. Medellin gave some of the victims' jewelry to his girlfriend. Tr. Vol. 31 at 743-50. Most importantly, Medellin confessed to the rape and murder of the two girls. In highly disparaging language, Medellin described his involvement in the tortuous rapes and killings. Medellin's confession admitted, at a minimum, to his sexual assault of the victim for whose death he was convicted. Also, his confession admitted that he "h[eld] one end of the shoe lace" used to strangle the victim. Simply, "[t]he record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if [Joe and Christina Cantu] had been severely impeached." *Strickler*, 527 U.S. at 294. There is no reasonable probability of a different outcome had the defense received the information that Medellin claims was withheld.

The state court did not unreasonably conclude that Medellin failed to establish that a constitutional violation tainted his trial. *See* 28 U.S.C. § 2254(d)(1). This claim is denied.

## V. Exclusion of Potential Juror

Medellin challenges the trial court's exclusion of potential juror Rosie L. Mackey for cause. When asked by the trial court whether she had any opposition to the death penalty she answered: "Religious beliefs. Thou shall not kill." Tr. Vol. 18 at 215. Ms. Mackey acknowledged a conflict: "I could follow the law; but, like I say, it's my religious belief. The law says one thing, and the religious belief says another." Tr. Vol. 18 at 216. Nonetheless, she indicated that she could impose a death sentence "if the evidence called for it." Tr. Vol. 18 at 216.

The State then questioned Ms. Mackey. The State focused on the statement in Ms. Mackey's jury questionnaire that she was "opposed to capital punishment under any circumstances." Tr. Vol. 18 at 218. She also indicated that she did not want to serve as a juror because of her religious convictions. Tr. Vol. 18 at 219. Ms. Mackey affirmed that her religious beliefs would impair her ability to return a death sentence in this case, and that, in fact, she would try to find a way to give a life sentence. Tr. Vol. 18 at 221-23.

Trial counsel then questioned Ms. Mackey about her ability to serve as an impartial juror. Ms. Mackey stated that she would be able to consider the guilt/innocence issues without any problem. Tr. Vol. 18 at 228-29. When asked if she could answer the special issues in a manner requiring the imposition of a death sentence, she stated "I still would have a hard time with it. I could vote like that, but I still would have a hard time within myself."

Tr. Vol. 18 at 229-30. Even so, she could not imagine a case in which she would be able to impose a death sentence, except that of Adolf Hitler. Tr. Vol. 18 at 230-31.

> The State again questioned Ms. Mackey and she clarified her position on serving as a juror:
>
> My religious belief is I don't believe in the death penalty. That was why I was asking if I could be excused from being in this jury or this case. I even stated on the paper—I remember on the back page that it stated: Would you want to be a juror in this case; I stated no.

Tr. Vol. 18 at 234. The trial court continued questioning Ms. Mackey. Ms. Mackey testified that she would be inclined to answer the special issues in such a way to ensure a life sentence, and would look at the evidence with that result in mind. Tr. Vol. 18 at 237.

The State moved to have Ms. Mackey excused for cause because of her inability to consider a death sentence. Tr. Vol. 18 at 238. Trial counsel opposed that motion. Tr. Vol. 18 at 238. The trial court then made the following findings:

> The Court makes specific findings in the standard set forth in Wainwright versus Witt in that I think Ms. Mackey is the classic vacillating juror.
>
> Based on her responses to the questionnaire, which she had validated in her oral responses to the Court, the Court finds that her strong feelings against capital punishment would prevent or substantially impair her performance as a juror in accordance with her oath and the Court's instructions, specifically her strong religious background which Mr. Vinson certainly established, her checking that she

was opposed to capital punishment under any circumstances.

* * *

The Court finds Ms. Mackey should be excused for cause.

Tr. Vol. 18 at 238-239.

Medellin raised this claim on direct review. After reviewing the applicable law and the voir dire transcript, the Court of Criminal Appeals stated that "[g]iven the totality of the voir dire, we cannot say that the trial court abused its discretion in sustaining the State's challenge for cause to the veniremember." Opinion at 10. This Court reviews that decision under the AEDPA.

Exclusion of prospective jurors "hesitant in their ability to sentence a defendant to death" without any limitations violates the Fourth and Fourteenth amendments. *Morgan v. Illinois*, 504 U.S. 719, 732 (1992); see also *Adams v. Texas*, 448 U.S. 38, 45 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968). The State must demonstrate through questioning that the potential juror it seeks to exclude lacks impartiality, and the judge must then determine whether the state's challenge is proper. *See Wainwright v. Witt*, 469 U.S. 412, 423 (1985). Thus, the key issue is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424 (quoting *Adams*, 448 U.S. at 45). "This standard . . . does not require that a juror's bias be proved with 'unmistakable clarity.' " *Wainwright*, 469 U.S. at 424. Thus, a reviewing court gives deference to a trial judge who could observe the demeanor of the potential juror. *Id.* at 424-26. This deference is consistent with AEDPA's presumption of correctness.

The exclusion of potential jurors is a question of fact. *See McCoy v. Lynaugh*, 874 F.2d 954, 960 (5th Cir. 1989); *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). The factual determinations of the Texas Court of Criminal Appeals are presumed to be correct, and the petitioner has the burden of rebutting these determinations by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). This Court can grant federal habeas relief only if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Fuller v. Johnson*, 114 F.3d 491, 500-01 (5th Cir.) (holding that a trial court's finding of juror bias is entitled to a presumption of correctness), *cert. denied*, 522 U.S. 963 (1997); *Granviel v. Lynaugh*, 881 F.2d 185, 187 (5th Cir. 1989) (stating that "[b]ecause of the difficulty of divining a prospective juror's state of mind, particularly on a cold record, we pay deference to the trial court's factual determination"), *cert. denied*, 495 U.S. 963 (1990).

> The trial court found that Ms. Mackey exemplified the juror described in *Wainwright v. Witt*:
>
> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

469 U.S. at 424-25 (footnote omitted). The state court's characterization of Ms. Mackey as a vacillating juror is presumed correct because Medellin has not rebutted the finding with appropriate evidence. *See* 28 U.S.C. § 2254(e)(1). After reviewing the record, this Court is in agreement with Respondent's assertion that the state court's finding was reasonable in light of Ms. Mackey's responses. *See* 28 U.S.C. § 2254(d)(2). Because the trial court clearly could have been "left with the definite impression that [Ms. Mackey] would be unable to faithfully and impartially apply the law," *Witt*, 469 U.S. at 426, the trial court had a reasonable basis for granting the State's challenge for cause. In short, Medellin has failed to demonstrate that the state court disposition "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *See* 28 U.S.C. § 2254 (d)(2). This claim is denied.

## CERTIFICATE OF APPEALABILITY

Although Medellin has not yet requested a Certificate of Appealability ("COA"), the issue of a COA is likely to arise. This court may deny a COA *sua sponte*. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000).[25] The Supreme Court has explained the standard for evaluating the issuance of a COA as follows:

[25] The Supreme Court in *Miller-El v. Cockrell*, __ U.S. __, 123 S. Ct. 1029 (2003), recently reversed a case from the Fifth Circuit involving the COA standard. Prior to *Miller-El*, the Fifth Circuit resolved the question of COA in some cases by first determining whether a petitioner was entitled to relief and then denying COA because the appeal lacked merit. In *Miller-El*, the Supreme Court clarified a *circuit court*'s role in the COA process. The *Miller-El* Court found that a circuit court's COA analysis should not rest upon a "full consideration of the factual or legal bases adduced in support

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El*, __ U.S. at __, 123 S. Ct. at 1039-40.

The Court has carefully considered each of Medellin's claims. While the issues Medellin raises deserve

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of the claims." *Miller-El*, __ U.S. at __, 123 S. Ct. at 1039 (2003). Rather, "[t]he COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* at __, 123 S. Ct. at 1039 (emphasis added). Thus, the Supreme Court held that "[w]hen a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying the denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* at __, 123 S. Ct. at 1039. A district court's evaluation of the COA *sua sponte* does not raise the same jurisdictional concerns present in *Miller-El*. While *Miller-El* rejected the Fifth Circuit's review of the merits of a claim before that claim was properly before the circuit court, the same jurisdictional concern is not present when a district court evaluates a COA *sua sponte* before appeal. This Court clearly has jurisdiction to decide *sua sponte* whether a COA is warranted.

scrutiny, the Court finds that each of his claims is foreclosed by clear, binding precedent. Under the appropriate standards, this Court concludes that Medellin has failed to make a "substantial showing of the denial of a constitutional right" with respect to each issue raised in his petition. 28 U.S.C. § 2253(c)(2). This Court concludes that Medellin is not entitled to a COA on any of his claims.

## CONCLUSION

Based on the foregoing, the Court concludes that Medellin is not entitled to federal habeas relief. As a result, it is hereby

**ORDERED** that Respondent's Motion for Summary Judgment (Docket Entry # 16) is Granted. It is further

**ORDERED** that Jose Ernesto Medellin's Petition for Writ of Habeas Corpus is **DENIED**, this case is **DISMISSED WITH PREJUDICE**, and a Certificate of Appealability will not issue.

The Clerk will provide copies of this Order to the parties.

SIGNED this 25th day of June, 2003.

JOHN D. RAINEY

John D. Rainey
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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Civil Action No. H-01-4078

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JOSE ERNESTO MEDELLIN,
*Petitioner,*

—v.—

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,
*Respondent.*

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## FINAL JUDGMENT

For the reasons stated in the Court's Order denying habeas relief and granting summary judgment in favor of Respondent, it is **ORDERED** that this case be dismissed with prejudice. The Court **DENIES** a certificate of appealability.

**THIS IS A FINAL JUDGMENT.**

SIGNED this 25th day of June, 2003.

JOHN D. RAINEY

John D. Rainey
United States District Judge

# D

# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. WR-50,191-03**

**EX PARTE JOSÉ ERNESTO MEDELLÍN,[1] Applicant**

**ON APPLICATION FOR WRIT OF HABEAS CORPUS, MOTION FOR LEAVE TO FILE AN ORIGINAL WRIT OF HABEAS CORPUS, AND MOTION FOR STAY OF EXECUTION FROM CAUSE NO. 675430 IN THE 339TH DISTRICT COURT HARRIS COUNTY**

***Per Curiam.*** **PRICE, J., filed a concurring statement in which COCHRAN and HOLCOMB, JJ., joined, except for Part V; COCHRAN, J., filed a concurring statement in which HOLCOMB, J., joined; MEYERS, J., filed a dissenting statement.**

## ORDER

We have before us a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5, a motion in the alternative for leave to file the application as an original writ of habeas

[1] Applicant filed the pleadings in this case under the name "José Ernesto Medellín Rojas." However, all of the prior papers filed in this Court, the papers filed in the United States Supreme Court, and documents at the Texas Department of Criminal Justice were entered under the name "José Ernesto Medellín." For consistency, we will continue to use the name "José Ernesto Medellín."

corpus, and a motion for stay of execution.

On September 16, 1994, a jury found applicant guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Medellin v. State*, No. AP-71,997 (Tex. Crim. App. Mar. 19, 1997) (not designated for publication). Applicant timely filed in the convicting court his initial post-conviction application for writ of habeas corpus in which he raised a claim alleging the violation of his rights under Article 36 of the Vienna Convention. The convicting court recommended that we deny this claim because applicant: (1) had failed to comply with the well-settled Texas contemporaneous-objection rule at trial; and (2) had no individually enforceable right to raise a claim, in a state criminal trial, regarding the Vienna Convention's consular access provisions. We adopted the trial court's findings of fact and conclusions of law and denied habeas relief. *Ex parte Medellin*, No. WR-50,191-01 (Tex Crim. App. Oct. 3, 2001)(not designated for publication). Applicant then filed the same claim in federal district court and was ultimately denied relief. *Medellin v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. April 17, 2003).

On March 31, 2004, the International Court of Justice (ICJ) issued a decision in *Case Concerning Avena and Other Mexican Nationals (Avena)*, 2004 I.C.J. No. 128 (March 31, 2004). The ICJ held that (1) the Vienna Convention guaranteed individually

enforceable rights; (2) the United States must "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [specified] Mexican nationals"; and (3) the United States must determine whether the violations "caused actual prejudice" to those defendants, without allowing American procedural default rules or laws to bar such review. *Id.* at 121-22, 153. In response to the opinion, President Bush issued a memorandum in which he stated that the United States would discharge its obligations under the *Avena* judgment by having State courts give effect to the ICJ decision in accordance with general principles of comity. Arguing that the ICJ opinion and the presidential memo were new legal and factual bases for his Vienna Convention claim, applicant filed a subsequent application for writ of habeas corpus with the trial court. Reviewing the claim under Article 11.071, § 5, this Court filed and set applicant's case and ordered briefing. *Ex parte Medellin*, 206 S.W.3d 584 (Tex. Crim. App. 2005). After briefing, argument, and an exhaustive analysis, this Court determined that neither the *Avena* decision nor the presidential memorandum constituted new legal or factual bases and dismissed the application. *Ex parte Medellin*, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006).

On this, his second subsequent application for writ of habeas corpus, and in his motion for a stay of execution, applicant again argues that new developments require us to provide him with judicial review and reconsideration of his Vienna Convention claim

under *Avena*.[2] Applicant argues that these new developments consist of: (1) the United States Supreme Court's decision in *Medellin v. Texas*, 552 U.S. ___ (2008), affirming and clarifying this Court's opinion in applicant's case; (2) the fact that a bill has been introduced in the United States House of Representatives which, if passed into law, would grant applicant a right to the judicial process required by *Avena*; (3) the indication by a Texas Senator that he will introduce similar legislation in the Texas Legislature in the 2009 session; and (4) the fact that the Inter-American Commission on Human Rights, allegedly the "only body to have reviewed *all* of the evidence pertaining to [applicant's] Vienna Convention violation under the standard required by the ICJ," on July 24, 2008, issued its preliminary findings concluding that applicant was prejudiced by the violation of his Vienna Convention rights. Application p. 2.

We have reviewed applicant's second subsequent application and find that it does not meet the dictates of Article 11.071, § 5, and should be dismissed. Art. 11.071, § 5(a). Applicant's motion in the alternative for leave to file the application as an original writ of habeas corpus is denied as is his motion for stay of execution.

IT IS SO ORDERED THIS THE 31ST DAY OF JULY, 2008.

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[2] Applicant does not phrase his claims specifically in terms of the Vienna Convention. However, the Vienna Convention and the *Avena* judgment are the underlying bases of the claims raised.

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-50,191-03

EX PARTE JOSÉ ERNESTO MEDELLÍN, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS, MOTION FOR LEAVE TO FILE AN ORIGINAL WRIT OF HABEAS CORPUS, AND MOTION FOR STAY OF EXECUTION FROM CAUSE NO. 675430 FROM THE 339TH DISTRICT COURT OF HARRIS COUNTY

**PRICE, J., filed a concurring statement in which HOLCOMB and COCHRAN, JJ., joined except as to Part V.**

## CONCURRING STATEMENT

The applicant alleges three circumstances he contends should qualify him to re-raise his Vienna Convention claim in yet another subsequent post-conviction application for writ of habeas corpus.[1] First, he points to the fact that Mexico has initiated another proceeding in the International Court of Justice (ICJ) seeking clarification of the *Avena* decision,[2] and that the ICJ has requested the United States to take precautionary measures (*i.e.*, refrain from executing

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[1] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820.

[2] *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I..C.J. No. 128 (Judgment of Mar. 31).

him) until it can render a decision. Second, he points to a determination by the Inter-American Commission on Human Rights (IACHR), an international tribunal that is an arm of the Organization of American States, that he was in fact prejudiced by the violation of his Vienna Convention rights.[3] Third, he argues that it would violate due process to execute him now because 1) legislation is pending in Congress that would effectively make the *Avena* judgment binding on domestic courts in the United States, and 2) a state senator has indicated he will introduce a similar bill in the next state legislature. I agree that none of these circumstances justifies this Court in entertaining a subsequent writ application under Article 11.071, Section 5.[4] For the reasons about to be given, I believe this Court's hands are tied. But that does not mean that the Executive Branch cannot act.

## I. International Court of Justice

In his first subsequent writ application, the applicant argued that, under the Supremacy Clause,[5] the *Avena* decision constituted binding federal law that trumped the abuse-of-the-writ provisions of Article 11.071, Section 5. In our opinion in *Ex parte Medellin*, we expressly rejected that argument.[6] Alternatively, the applicant argued that the *Avena* decision constituted

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[3] Medellin v. United States, Case 12.644, Inter-Am. C.H.R., Report No. 45/08 OEA/Ser/L/V/II.132, doc. 21 (2008).

[4] TEX. CODE CRIM. PROC. art. 11.071, § 5.

[5] U.S. CONST. art. II, § 2, cl. 2.

[6] 223 S.W.3d 315, 330-32 (Tex. Crim. App. 2006).

new law and/or new facts that would justify a subsequent writ application under Article 11.071, Section 5. We rejected that argument in *Medellin* as well.[7] Having rejected these arguments, we cannot very well hold that a request for precautionary measures pending a new proceeding that has been instituted in the ICJ that would merely clarify the holding of *Avena* either trumps, or, alternatively, falls under the ambit of, Article 11.071, Section 5. The United States Supreme Court ratified our reliance upon the statutory abuse-of-the-writ doctrine, notwithstanding *Avena*, in its certiori review of our decision.[8] We must therefore heed the current legislative prohibition against entertaining a subsequent writ under these circumstances—unless and until Congress should act in such a way that we should be bound by the *Avena* judgment, notwithstanding contrary state law.

## II. Inter-American Commission on Human Rights

The applicant also alleges that the IACHR's decision that the violation of his Vienna Convention rights was prejudicial and amounted to a violation of the due process guarantees embodied in the 1948 Declaration of the Rights and Duties of Man, constitutes both new law and new facts for purposes of Article 11.071, Section 5. But in *Medellin*, we held that the *Avena* decision constituted law, not fact, and the same must surely be said of any decision of

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[7] *Id.* at 348-352.

[8] *Medellin v. Texas*, ___ U.S. ___, 128 S.Ct. 1346 (2008).

the IACHR.[9] With respect to new law, we held in *Medellin* that, to be cognizable under Article 11.071, Section 5, it must emanate from "a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state."[10] International tribunals are not included within this statutory ambit. In any event, it is not clear—and it has not been pled here—that a decision of the IACHR is binding on domestic courts in the same way that it has been arguable that a decision of the ICJ with respect to the Vienna Convention is binding under the Supremacy Clause by virtue of the Optional Protocol.[11] Thus, even if the IACHR judgment somehow constituted a new fact or law for purposes of Article 11.071, Section 5, notwithstanding what we said in *Medellin*, it is still not clear that by invoking it the applicant has presented anything that, even if true, would entitle him to relief.

## III. Pending Legislation

The applicant alleges that on July 14, 2008, a bill was introduced in the House of Representatives, entitled the "Avena Case Implementation Act of 2008," which would expressly provide for judicial remedies to carry out the treaty obligations that *Avena* construed

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9 *Ex parte Medellin*, *supra*, at 351.

10 *Id.* at 352.

11 Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations, Apr. 21, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820. "By ratifying the Optional Protocol to the Vienna Convention, the United States consented to the specific jurisdiction of the ICJ with respect to claims arising out of the Vienna Convention." *Medellin v. Texas*, *supra*, S.Ct. at 1354.

the Vienna Convention to impose.[12] The applicant contends that to execute him while such legislation is pending would violate federal due process, given the fact that nobody disputes that the *Avena* decision, once implemented by Congress, would require domestic courts to undergo a review and reconsideration of his conviction and sentence before he could be executed.[13] This is entirely too speculative to support a due process claim. The applicant has

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[12] As introduced in the House of Representatives, and referred to the Judiciary Committee, the bill reads:

> **SECTION 1. SHORT TITLE.**
>
> *This Act may be cited as the "Avena Case Implementation Act of 2008".*
>
> **SECTION 2. JUDICIAL REMEDY.**
>
> (a) CIVIL ACTION.—Any person whose rights are infringed by a violation by any nonforeign governmental authority of Article 39 of the Vienna Convention on Consular Relations may in a civil action obtain appropriate relief.
>
> (b) NATURE OF RELIEF.—Appropriate relief for the purposes of this section means—
>
> (1) any declaratory or equitable relief necessary to secure the rights; and
>
> (2) in any case where the plaintiff is convicted of a criminal offense where the violation occurs during and in relation to the investigation or prosecution of the offense, any relief required to remedy the harm done by the violation, including the vitiation of the conviction or sentence where appropriate.
>
> (c) APPLICATION.—This Act applies with respect to violations occurring before, on, or after the date of the enactment of this Act.

[13] In *Medellin v. Texas, supra*, S.Ct. at 1356, the Supreme Court observed, "No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law

no expectation that the proposed legislation will be enacted. Until such a statute is passed, the *Avena* decision is not binding; and if *Avena* is not binding, the applicant cannot predicate a due process claim upon it. Again, the applicant simply fails to state facts that would entitle him to habeas corpus relief. Any claim based upon legislation that might be introduced at the next legislative session in Texas suffers a similar fate.

## IV. Original Application for Writ of Habeas Corpus

The applicant urges us to by-pass the abuse-of-the-writ provisions of Article 11.071, Section 5, by simply treating his application as an invocation of our original writ jurisdiction. This we may not do. It is indisputable that the applicant is challenging the validity of his conviction and death sentence. We have made it clear that under such circumstances we are bound to entertain any post-conviction writ of habeas corpus only under the purview of the procedures set out in Article 11.071—including the abuse-of-the-writ provisions in Article 11.071, Section 5.[14]

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obligation on the part of the United States." But the Supreme Court held that implementing legislation was required before the particular international law obligation embodied in Article 36 of the Vienna Convention as construed by the ICJ in *Avena* would have binding domestic legal effect. *See, e.g., id.* at 1357, 1367 ("Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment is not binding domestic law. * * * In sum, while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions.").

[14] *Ex parte Smith*, 977 S.W.2d 610, 611 (Tex. Crim. App. 1998), *citing Ex parte Davis*, 947 S.W.2d 216, 221, 223 (Tex. Crim. App. 1996) (Opinion of McCormick, P.J.) ("the Legislature clearly has intended for Article 11.071 to provide the exclusive means by which this Court may exercise its original habeas corpus jurisdiction in death penalty cases.").

## V. Executive Clemency

For all of the above reasons, this Court is not at liberty to stop the applicant's execution. But the Governor is. The applicant informs us that he has requested that the Board of Pardons and Paroles recommend to the Governor that he grant the applicant a 240-day reprieve so that there will be time for the proposed federal legislation to be considered in Congress.[15] Moreover, the Governor himself may grant a 30-day reprieve even absent a recommendation from the Board.[16] It would be an embarrassment and a shame to the people of Texas and the rest of the country (albeit not presently unconstitutional) if we were to execute the applicant despite our failure to honor the international obligation embodied in the *Avena* judgment when legislation may well be passed in the near future by which that obligation would become, not merely precatory, but legally (and retroactively) binding upon us. The Executive Branch most appropriately exercises its clemency authority when the judicial branch finds itself powerless to rectify an obvious and manifest injustice. This, I think, is such a situation, and I would urge the Board and the Governor to act.

Filed: July 31, 2008
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[15] TEX. CONST. art. IV, § 11(b); 37 TAC §§ 143.41(b) & (c); §§143.43(f)(1) & (j)(1).

[16] TEX. CONST. art. IV, § 11(b); 37 TAC § 143.41(a).

# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO.WR-50,191-03**

**EX PARTE JOSÉ ERNESTO MEDELLÍN**

**ON APPLICATION FOR WRIT OF HABEAS CORPUS, MOTION FOR LEAVE TO FILE AN ORIGINAL WRIT OF HABEAS CORPUS, AND MOTION FOR STAY OF EXECUTION FROM CAUSE NO. NO. 675430 IN THE 339TH DISTRICT COURT HARRIS COUNTY**

COCHRAN, J., filed a concurring statement. HOLCOMB, J., joins

I join the Court's Order denying applicant's motion for leave to file an original application and motion for a stay of execution and dismissing his third application for a writ of habeas corpus. Even if our law allowed for consideration of this third (and repetitious) application, which it does not, applicant is not entitled to any relief on the merits of his claim under Texas or United States law.

First, let us be clear about applicant's claim. Born in Mexico, applicant was brought to the United States when he was three years old and, at the time he was arrested, had lived in this country for fifteen of his eighteen years. He spoke fluent English, but he never

obtained, nor apparently ever sought, U.S. citizenship. So, at the time of his arrest and trial, he was legally a Mexican citizen. His claim is that no one informed him of his right to contact the Mexican consulate. This is true. It is also true that he was never denied access to the Mexican consulate. The problem is that he apparently never told any law enforcement or judicial official that he was a Mexican citizen until some four years after his conviction. Applicant never informed the arresting officers that he was a Mexican citizen.[1] He makes no claim that he informed any magistrate that he was a Mexican citizen. He points to no evidence that he informed the trial judge before or during his trial that he was a Mexican citizen.[2] We do not know what the arresting officers, the magistrate, or the trial judge would have done had any of them been informed that applicant was a citizen of Mexico. Perhaps they would have informed him of his right to contact his consulate for assistance. While Texas authorities clearly failed in their duty to inform this foreign national of his rights under the Vienna Convention, this foreign national equally failed in his duty to inform those

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[1] In his confession to the police, he did tell the interviewing officer that "I was born in Laredo Mexico on 3/4/75. I last went to school at Eisenhower High School and have a total of 8 years of formal education." He did nothing to inform the officer that, despite his almost life-long residence in the U.S., he was not a U.S. citizen. He did tell the Harris County Pre-Trial Services Agency that he was not a U.S. citizen, but that public service agency has no law enforcement or judicial role. It merely collects information for assessing whether to recommend release on a pre-trial recognizance bond.

[2] Applicant, like three of his fellow gang-member co-defendants and applicant's younger brother, the one juvenile co-defendant, has a Hispanic surname. In the melting pot that is America, many U.S. citizens have ethnic names, but are native born or naturalized. Our laws do not assume that those who were born in a foreign country or who have ethnic surnames are not fellow citizens.

authorities that he was a Mexican citizen. Although one would like to think that all Texas public officials are clairvoyant about the nationality of all who appear before them, they are not required to be, nor, when there is no reason to believe that a defendant is anything but a U.S. citizen, should they be.

As this Court explained at considerable length in applicant's last application for a writ of habeas corpus,[3] Texas law does not permit a defendant to raise a claim four years after his trial that he was not notified before or during his trial of his rights under the Vienna Convention, the U.S. Constitution, the Texas Constitution, or any other law. This claim was procedurally defaulted by the failure to raise it in a timely manner.

In Texas, we have a contemporaneous objection rule which requires all litigants to make a timely request, claim, or objection or forfeit the right to raise that request, claim, or objection after trial. This same rule applies in every jurisdiction in America. As the Supreme Court explained over thirty years ago, the contemporaneous objection rule serves important judicial interests in American criminal cases and deserves respect throughout the land.

> A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question.[4]

Furthermore, a contemporaneous objection permits the trial judge to remedy potential error

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[3] *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006), *aff'd*, 123 S. Ct. 1346 (2008).

[4] *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977).

before it occurs.[5] In the present case, for example, had applicant informed any legal officer that he was a Mexican national and wanted to consult with his consulate, any such official could have (and presumably would have) willingly complied with the requirements of the Vienna Convention. If applicant had delayed telling anyone of his Mexican citizenship until trial, the trial judge could have immediately informed the Mexican consulate, allowed applicant to do so himself, or perhaps given him a continuance to seek assistance from his consulate.

As the Supreme Court has explained, the failure to abide by the contemporaneous objection rule "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."[6] Finally, it is the criminal trial itself that is "the main event"; it is not "a tryout on the road" to more than a decade of appellate review and re-review.[7]

> The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses,

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[5] *Id.*

[6] *Id.* at 89.

[7] *Id.* at 90.

> having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.[8]

Texas courts have long followed the Supreme Court's reasoning concerning the importance of the contemporaneous objection rule in the fair, effective, and efficient operation of its state courts.[9] Indeed, the contemporaneous objection rule has been a bulwark of the Anglo-

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[8] *Id.*

[9] *See, e.g., Saldano v. State*, 70 S.W.3d 873, 886-88 (Tex. Crim. App. 2002) ("Our rules require defendants to object at trial in order to preserve an error for review on appeal. . . . Our law has always been thus. The courts of every state and the courts of the United States have similar rules.") (footnotes omitted). In *Saldano*, we noted that "objections promote the prevention and correction of errors. When valid objections are timely made and sustained, the parties may have a lawful trial. They, and the judicial system, are not burdened by appeal and retrial. When a party is excused from the requirement of objecting, the results are the opposite." *Id.* at 887. Of course, not *all* rights are necessarily waived by the failure to assert them in a timely manner. As we stated in *Saldano*, "[a]ll but the most fundamental rights are thought to be forfeited if not insisted upon by the party to whom they belong. Many constitutional rights fall into this category. When we say 'that even constitutional guarantees can be waived by failure to object properly at trial,' we mean that some, not all, constitutional rights may be forfeited." *Id.* (some internal quotations omitted). Thus, violations of "'rights which are waivable only' and denials of 'absolute systemic requirements'" may be raised for the first time on appeal.

The failure to notify a foreign national defendant of his right to contact his consulate is not such a "waivable only" right nor is it one that is an absolute systemic requirement without which a trial is necessarily fundamentally unfair. In fact, the United States Supreme Court has expressly held that Vienna Convention claims are subject to normal American rules of procedural default if a defendant fails to make a contemporaneous objection. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 (2006) ("We therefore conclude, as we did in *Breard*, that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to

(continued...)

American Common Law for centuries. It is based upon our fundamental concept of an adversarial system of justice. The International Court of Justice, however, is more familiar with the Napoleonic Code and an inquisitorial system of criminal justice. That system is very different from our own, and has its own virtues and vices. It does not rely upon our adversarial principles in which a jury listens to opposing lawyers presenting all of the relevant, conflicting, and competing evidence and witnesses to the factfinder at one time and in one place with the judge ruling on all legal questions and claims at that time. In our Anglo-American system the trial is the main event. The European criminal justice system does not depend upon our finely-tuned jury trial procedures, and thus it need not be concerned about the importance of our contemporaneous objection rule or that of procedural default. But those rules are essential to our American justice system.

Applicant claims that the *Avena* judgment necessarily trumps all Texas and federal procedural rules because it ordered that the convictions of fifty-four foreign nationals be "reviewed" regardless of bedrock American procedural default rules. The Supreme Court held otherwise in its recent decision in *Medellin v. Texas*.[10] Although we accord the greatest respect to, and admiration for, the International Court of Justice (ICJ) and its judgments, we, like the Supreme Court, cannot trample on our own fundamental laws in deference to its judgment. We would give even the Devil the benefit of our American law, but if we cut

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[9](...continued)
other federal-law claims."); *Breard v. Greene*, 523 U.S. 371, 375-76 (1998) (*per curiam*).

[10] 128 S.Ct. 1346 (2008).

down our laws to suit another sovereign that operates under a different system of justice, we could not stand upright in the lawless winds that would then blow.[11] If we violate our state and federal procedural rules for this particular applicant, we should violate them for all American defendants as well. And then we would have no rules and no law at all.

But it seems that the ICJ intended to do just that: to impose its sense of Napoleonic Code inquisitorial justice without regard for other sovereigns' well-established laws and procedures. So let me consider this case from its perspective and review the merits of applicant's claim in accord with the ICJ's *Avena* judgment.[12]

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[11] *See* Robert Bolt, A Man for All Seasons (1960):

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|---|---|
| William Roper: | So, now you give the Devil benefit of law! |
| Sir Thomas More: | Yes! What would you do? Cut a great road through the law to get after the Devil? |
| William Roper: | Yes, I'd cut down every law in England to do that! |
| Sir Thomas More: | Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake! |

[12] Justice Stevens, in his concurring opinion in *Medellin*, not-so-subtly suggested that, even though he and six other members of the Supreme Court affirmed the legal position of this Court concerning the procedural default rule, we really should review the merits of applicant's claim because "[t]he cost to Texas of complying with *Avena* would be minimal, particularly given the remote likelihood that the violation of the Vienna Convention actually prejudiced José Ernesto Medellin." 128 S.Ct. at 1375 (Stevens, J., concurring). I agree with Justice Stevens that it is extremely remote that applicant was prejudiced in any way by the failure of Texas officials to inform him that he could seek assistance from his consulate.

Applicant was arrested for, charged with, and convicted of an extraordinarily gruesome rape and murder of two teen-aged girls in Houston, Texas, in 1993. The two girls,14-year-old Jennifer Lee Ertman and 16-year-old Elizabeth Pena, were friends and classmates at Waltrip High School. They were simply walking home one June evening when they were attacked by applicant and several of his gang-members who repeatedly raped both girls, then dragged them into the woods to kill them and hide their bodies. Applicant helped to strangle at least one of the girls with her own shoelace. He later complained to a friend that he had a hard time getting Jennifer Ertman to die and had to step on her throat to finish her off. The girls' decomposed bodies were discovered four days later.

Applicant bragged to his buddies that both of the girls were virgins until he and his cohorts raped them. He confessed to police officers after being properly advised of his rights to counsel under *Miranda*.[13] He explained, in great detail, how his group was involved in a gang-initiation rite until the two girls innocently wandered past them on their way home. His written confession displayed a callous, cruel, and cavalier attitude toward the two girls that he had raped and helped to murder. Surely no juror or judge will ever forget his words or his

[13] *Miranda v. Arizona*, 384 U.S. 436 (1966). One can only wonder if the criminal justice systems with which the distinguished judges on the ICJ are familiar require that law enforcement officers give all arrested suspects explicit warnings concerning their right to silence, their right to an attorney before talking to the police, the right to have an attorney appointed for them if they cannot afford them, notification that any statements that they make can be used against them in a court of law, and, under Texas law, the right to terminate an interview with the police at any time. Telling an arrested foreign national that he has a right to contact his consulate is an important international right, but surely it is not nearly as important as giving him *Miranda*-type warnings.

sordid deeds.

Applicant and four of his fellow gang members were convicted of these murders and all were sentenced to death.[14] One of them, Sean Derrick O'Brien, has been executed. The death sentences for two of the gang members were later commuted to life in prison under *Simmons v. Roper*, because they were seventeen at the time of the murders.[15] Applicant and Peter Cantu both remain in prison awaiting execution.

Applicant's argument on the merits of his consular notification claim is as follows:

- If I had been told before trial that I could notify the Mexican consulate that I had been arrested for a double murder and rape, I would have done so;
- If I had notified the Mexican consulate before trial that I wanted its help, it would have given me "substantial assistance";
- The "substantial assistance" that the Mexican consulate would have given me would be that of providing me with a top-notch lawyer instead of the lawyer that the trial court appointed to represent me;
- The lawyer that did represent me at trial had been suspended from the practice of law for ethics violations in a different case;
- If a different, better lawyer, paid by the Mexican Consulate, had represented me at trial, I would not have been sentenced to death for the rape-murder of these two girls, even though my four cohorts were all sentenced to death in their trials, represented by their lawyers.

Applicant argues that a lawyer chosen by the Mexican consulate would have

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[14] A sixth member of the gang was also prosecuted, but was not sentenced to death because, under Texas law, he was a juvenile at the time of the offense and thus ineligible for the death penalty.

[15] *See Roper v. Simmons*, 543 U.S. 551 (2005).

introduced sufficient background, character, and "life history" evidence that the jury would necessarily have sentenced him to life in prison instead of death. He argues that a better pretrial investigation by a better lawyer would have shown that applicant grew up in an environment of abject poverty and violence. He states that he was abandoned by his parents at the age of four and left to live with an elderly relative. He also states that he became "exposed to serious violence shortly after rejoining his parents in Houston five years later." Then, simultaneously abandoned and abused by his parents, he was further exposed to "bad influences" in middle school. He claims that, "[a]s recent immigrants, his parents lacked the skills to understand and address the pressures [applicant] faced at school." So he developed behavioral and emotional problems as well as an alcohol abuse problem, and he dropped out of school. And those "profound experiences" explain why he and his five fellow gang-members raped, robbed, and killed two teen-aged girls who just happened to walk by during their gang initiation. Applicant asserts, "On the record before this Court, the result is not fairly in doubt: were it not for the violation of the Vienna Convention, [applicant] would not be on death row."

This argument might have some plausible intellectual appeal had just one, any one, of applicant's cohorts not been sentenced to death despite the best efforts of their respective attorneys during their individual trials. Applicant may or may not have been the ringleader of this gang, but he was, at a minimum, fully and gleefully involved in the brutal rapes and

murders of these two young girls.[16] The evidence at trial showed that he bragged about his gory and sadistic exploits to his friends. The State also put on considerable evidence showing his prior violence and post-offense violence in jail. The jurors heard a great deal of evidence about applicant's extensive gang-related illegal activities before this crime and how he was expelled from school because of gang activities. No Officer Krupke would ever conclude that applicant's crimes and those of his cohorts were just the unfortunate product of a sad and sorry upbringing.[17]

Applicant complains that his trial attorney was incompetent. These claims have been reviewed by the trial court, by this Court, by a federal district court, and by the Fifth Circuit

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[16] In addressing applicant's legal claims, it is not necessary to recite all of the specific details of this disgusting sexual attack and tortuous murders . Suffice it to say that the jury heard overwhelming evidence of applicant's depravity and of the girls' suffering.

[17] *See* Stephen Sondheim, *"Gee Officer Krupke," West Side Story*:

Dear kindly Sergeant Krupke,
You gotta understand,
It's just our bringin' up-ke
That gets us out of hand.
Our mothers all are junkies,
Our fathers all are drunks.
Golly Moses, natcherly we're punks!

Gee, Officer Krupke, we're very upset;
We never had the love that ev'ry child oughta get.
We ain't no delinquents,
We're misunderstood.
Deep down inside us there is good!

Court of Appeals.[18] All of these courts (a total of fourteen individual judges) have rejected those complaints as being totally without merit. This claim could have been, but was not, submitted to the U.S. Supreme Court. Further review by any lower court would be redundant. It is highly improbable that any lawyer in the State of Texas, the United States, the European Union, or any other jurisdiction could have saved applicant (or any of his cohorts) from a sentence of death for the heinous, horrific and mindless offenses that they committed during one summer evening in 1993 in the State of Texas.

In sum, I wholeheartedly agree with Justice Stevens's conclusion that "[t]he cost to Texas of complying with *Avena* would be minimal, particularly given the remote likelihood that the violation of the Vienna Convention actually prejudiced José Ernesto Medellin."[19] I would go further: there is no likelihood at all that the unknowing and inadvertent violation of the Vienna Convention actually prejudiced Medellin. This was a truly despicable crime committed by five truly brutal young men who were deadly dangerous to anyone who might

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[18] In its published opinion, *Medellin v. Dretke,* 371 F.3d 270 (5th Cir. 2004), the Fifth Circuit sets out the history of these ineffective assistance of counsel claims. One of those claims was that counsel failed to offer evidence that applicant had successfully completed a prior juvenile probation and this evidence would have shown that he was not a future danger. The Fifth Circuit noted that this failure was hardly important in comparison to the brutal murders he committed thereafter or the fact that on "two separate occasions while [applicant] was in the Harris County jail awaiting trial, [he] was found to have hidden shanks in his cell. One cannot reasonably fathom how the fact that [applicant] once complied with probation as a juvenile rebuts the overwhelming evidence that [he] posed a future danger. Nothing that his probation officer may have said could have conceivably caused the jury to decide the question of [applicant's] future dangerousness in [his] favor." *Id.* at 276.

[19] *Medellin v. Texas,* 128 S.Ct. 1346,1375 (2008) (Stevens, J., concurring).

find themselves near them. All five were sentenced to death by separate juries after hearing all of the evidence in each of their individual trials. No matter how long the courts of this state, this nation, or any other nation review, re-review, and re-review once again the disgusting facts of this crime and these perpetrators, the result should be the same: These juries reached a reasonable verdict, beyond a reasonable doubt, that a sentence of death was the only appropriate punishment under Texas law.

Some societies may judge our death penalty barbaric. Most Texans, however, consider death a just penalty in certain rare circumstances. Many Europeans may disagree. So be it. But until and unless the citizens of this state or the courts of this nation decide that capital punishment should no longer be allowed under any circumstances at all, the jury's verdict in this particular case should be honored and upheld because applicant received a fundamentally fair trial under American law.

Filed:

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# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. WR-50,191-03**

**EX PARTE JOSÉ ERNESTO MEDELLÍN, Applicant**

**ON APPLICATION FOR WRIT OF HABEAS CORPUS, MOTION FOR LEAVE TO FILE AN ORIGINAL WRIT OF HABEAS CORPUS, AND MOTION FOR STAY OF EXECUTION FROM CAUSE NO. 675430 IN THE 339TH DISTRICT COURT HARRIS COUNTY**

**MEYERS, J., filed a dissenting statement.**

I would file and set applicant's Article 11.071/original writ. *See Ex parte Davis*, 947 S.W.2d 216 (Tex. Crim. App. 1996).

Meyers, J.

Filed: July 31, 2008

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ing any reward money in exchange for their cooperation or testimony; Munier was aware that Christina Cantu was pregnant, but Munier was not aware of any miscarriage; and, that Munier was never told of any alleged beating of Christina Cantu.

60. The Court finds, according to the credible affidavit of Harris County Assistant District Attorney Mark Vinson, the prosecutor in the applicant's capital murder trial, that, Vinson did not make any deals or agreements with Joe or Christina Cantu involving their testimony in the trials; that Vinson did not promise or assure either Joe or Christina Cantu that they would receive any reward money in exchange for their cooperation and testimony; that Vinson has no specific recollection of being aware of either Joe Cantu's 1994 arrest for a misdemeanor offense or the disposition of Joe Cantu's case; that Vinson had nothing to do with the disposition of Joe Cantu's case; that Vinson has a slight recollection of being aware that Christina Cantu was pregnant, but he was never aware of any miscarriage; and, that Vinson was never told of any alleged beating of Christina Cantu.

61. The Court finds, based on official court records, that a complaint against Joe Cantu for the misdemeanor offense of terroristic threat, cause no. 9425339, Harris County Court at Law # 13, was dismissed on August 4, 1994, based on insufficient evidence; that trial testimony began in the applicant's case on September 12, 1994 (R. XXVIII - 34); and, that Joe Cantu testified in the applicant's case on September 14, 1994 (R. XXX - 490-577). *See attached complaint and motion to dismiss, cause no. 9425339.*

62. The Court finds, based on the credible affidavit of Harris County Assistant District Attorney Joni Vollman, that Vollman was the chief prosecutor in Harris County

Court at Law #13 in August, 1994; that Vollman signed the motion to dismiss contained in the clerk's file in the State of Texas v. Joe Cantu, cause no. 9425339, in which Cantu was charged with the misdemeanor offense of terroristic threat; that Vollman has no specific recollection as to the facts of the case in cause no. 9425339; that Vollman had some awareness that Joe Cantu was related to the defendant Peter Cantu, one of the defendant's in Elizabeth Pena and Jennifer Ertman's murders; that Vollman's vague awareness about this relationship did not influence Vollman's dismissal of the charges against Joe Cantu in cause no. 9425339; that Vollman would have specifically remembered if anyone in the Harris County District Attorney's Office had approached her, requesting, suggesting, or ordering that charges be dismissed against Joe Cantu; that Vollman states with certainty that she has no such recollection; and, that the charges against Joe Cantu in cause no. 9425339 were dismissed based on insufficient evidence. *See attached March 1, 2000 affidavit of Joni Vollman.*

## CONCLUSIONS OF LAW

*First Ground—ineffective assistance of appellate counsel re Batson claim: Fourth Ground—Batson issue*:

1. The trial court properly found that the State's explanations that the State exercised a peremptory strike against prospective juror Elizabeth Berry based on her two brother's criminal history, including one of the brother's being on parole and the other brother being incarcerated, and based on Berry's perception of the applicant being the underdog and the prosecutor being the attacker were racially neutral explanations logically

related to the instant case. *See Harris v. State*, 827 S.W.2d 945, 955 (Tex. Crim. App. 1992) (holding that prosecutor's explanation in capital case that he struck venireperson because her brother was on probation for burglary was racially neutral).

2. The trial court properly found that the State's explanation that the State struck prospective juror Rafael Rodriguez, in part, because the State still did not have a full understanding of Rodriguez's position on the death penalty is supported by the ambiguity of Rodriguez's cited voir dire statements about the death penalty, and the State's explanation that the State feared that Rodriguez believed in "turning the other cheek" was a racially neutral explanation which does not violate the precepts of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986); *see Cantu v. State*, 842 S.W.2d 667, 688-9 (Tex. Crim. App. 1992) (holding that trial court's finding that prosecutor's reasons for striking prospective juror were racially neutral where prosecutor stated that strike was based, in part, on prospective juror's volunteer work indicating that she would be "kind-hearted"); *see also Lewis v. State*, 911 S.W.2d 1, 4 (Tex. Crim. App. 1995) (holding that prosecutor could exercise peremptory strikes against two prospective jurors who were not in favor of death penalty as long as strikes not made in racially discriminatory manner).

3. The applicant, in his written motion to strike the jury panel, fails to establish a *prima facie* case of purposeful discrimination in the State's peremptory strikes. *Harris*, 827 S.W.2d at 955 (holding that defendant, in order to establish *prima facie* case, may rely on fact that peremptories constitute jury selection practice that allows those to discriminate who are of mind to discriminate, and defendant must show this fact and other

relevant circumstances raise inference that peremptories were exercised to exclude prospective jurors on basis of race).

4. In the alternative, the trial court properly found that the State's explanations for striking specific jurors were racially neutral. *Wheatfall v. State*, 882 S.W.2d 829, 835 (Tex. Crim. App. 1994) (holding State has burden to present neutral explanation for strike); *see also Trevino v. State*, 864 S.W.2d 499, 500 (Tex. Crim. App. 1993) (holding State's explanation for strike does not have to rise to level needed to justify challenge for cause).

5. The applicant fails to show that the trial court's decision that the State's strikes were racially neutral was clearly erroneous. *Id.* (holding appellate court may not reverse trial court's decision that State's strike is racially neutral unless trial court's decision is clearly erroneous and trial court's choice of interpretation may not be found to be clearly erroneous when evidence is susceptible to two reasonable interpretations and trial court's decision is in accord with one of these two interpretations).

6. The applicant fails to show that the trial court erred in allegedly failing to grant a *Batson* hearing, and the applicant fails to show that his rights under the equal protection clause, U.S. CONST. amend. XIV, were violated.

7. The applicant fails to show that appellate counsel is ineffective for not presenting on direct appeal the claim that the trial court allegedly erred in finding that the State gave race neutral reasons for peremptory strikes and in allegedly not granting a *Batson* hearing. The applicant fails to show that, but for appellate counsel's alleged error, the results of the proceeding would have

been different. *Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App. 1994) (holding that *Strickland* standard applies to appellate counsel as well as trial counsel).

*First Ground—ineffective assistance of appellate counsel re Motion to Preclude State from Seeking Death Penalty*:

8. The applicant fails to show that appellate counsel is ineffective for not advancing the meritless claim that the trial court allegedly erred in orally denying the applicant's Motion to Preclude State from Seeking the Death Penalty when the trial court allegedly granted the same written motion. *See Butler*, 884 S.W.2d at 783; *see also Kinnamon v. State*, 791 S.W.2d 84, 97 (Tex. Crim. App. 1990) (counsel not ineffective for failing to request jury charge on lesser-included of murder when the evidence did not support such charge).

*Second Ground—ineffective assistance of counsel re contacting probation officer*:

9. The applicant fails to show deficient performance, much less harm, in trial counsel's not contacting probation officer Guerra and not presenting punishment evidence that the applicant was allegedly punctual for appointments with his probation officer and that the applicant allegedly presented no problems for his probation officer, in light of the overwhelming evidence of the brutality of the applicant's crime, the applicant's past illegal activities, and the applicant's inability to function in the structured environments of school and jail. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

*Second Ground—ineffective assistance of counsel re parole eligibility instruction*:

10. The trial court properly did not instruct the jury as to parole eligibility and defense counsel properly did not voir dire on the issue of parole eligibility. *See Martinez v. State*, 924 S.W.2d 693 (Tex. Crim. App. 1996) (holding issue of parole eligibility not a matter for jury's consideration in capital murder trial); *Rhoades v. State*, 934 S.W.2d 113 (Tex. Crim. App. 1996) (citing *Smith v. State*, 898 S.W.2d 838, 846 (Tex. Crim. App. 1995)).

11. Trial counsel are not ineffective for making the reasonable, strategic decision, based on prior experience, not to request that the jury be informed and instructed concerning parole eligibility, an instruction which would make the jury aware that the eighteen-year old applicant would be eligible for parole at the relatively young age of forty-three. *Ex parte Ewing*, 570 S.W.2d 941 (Tex. Crim. App. 1978) (appellate court will review trial strategy only when it is without a plausible basis).

12. The applicant fails to show deficient performance, much less harm, based on trial counsels' reasonable trial strategy of not informing the jury concerning parole eligibility; thus, the applicant fails to show that his rights, pursuant to U.S. CONST. Amends. VI and XIV, were violated.

*Third Ground—Vienna Convention*:

13. Based on the applicant's lack of objection at trial to the alleged failure to inform him of his rights under the Vienna Convention, the applicant is procedurally barred from presenting his habeas claim that the alleged violation of the Vienna Convention violated his constitutional rights. *Hodge v. State*, 631 S.W.2d 754, 757

(Tex. Crim. App. 1982); *Williams v. State*, 549 S.W.2d 183, 187 (Tex. Crim. App. 1977).

14. In the alternative, the applicant fails to show foreign nationality which requires notification of a foreign consulate when a "national" of the "sending state" is detained in custody. *See Maldonado v. State*, 998 S.W.2d 239, 246-7 (Tex. Crim. App. 1999) (holding that defendant not entitled to art. 38.23 instruction where defendant not informed of his right to consult consulate but evidence showed that defendant lived in United States many years, spoke English, had Texas driver's license, and bought car in United States and evidence did not show that defendant was a Mexican citizen).

15. In the alternative, the applicant, as a private individual, lacks standing to enforce the provisions of the Vienna Convention. *Hinojosa v. State*, No. 72,932 (Tex. Crim. App. Oct. 27, 1999) (holding that treaties operate as contracts among nations; thus, offended nation, not individual, must seek redress for violation of sovereign interests).

16. In the alternative, the applicant fails to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; the applicant was provided with effective legal representation upon the applicant's request; and, the applicant's constitutional rights were safeguarded. *See and cf. Rocha v. State*, 16 S.W.3d 1, 19 (Tex. Crim. App. 2000) (holding that treaties do not constitute "laws" for purpose of TEX. CODE CRIM. PROC. art. 38.23, and Vienna Convention Treaty illustrates proposition that art. 38.23 is not suitable enforcement mechanism for international treaties).

17. The applicant fails to show that his rights, pursuant to U.S. CONST. amends. V, VI, and XIV, were violated and fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. *Ex parte Barber*, 879 S.W.2d 889, 891-92 (Tex. Crim. App. 1994) (holding that, in order to be entitled to habeas relief, defendant must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment).

*Fifth Ground—Brady issue*:

18. The applicant fails to show that there was any deal between the State and Joe and Christina Cantu; thus, the applicant fails to show that the State did not disclose material evidence, i.e., a non-existent agreement between Joe and Christina Cantu in exchange for their testimony during the applicant's trial. The applicant fails to show that the State did not disclose a non-existent agreement or any alleged favorable and material information in the instant case. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976); *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985) (holding evidence is material where there is a reasonable probability that, if disclosed, result of the proceeding would have been different). The applicant fails to show that he was denied due process under U.S. CONST. amend. XIV and TEX. CONST. art. 1, § 10.

19. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 675430-A.

Signed this 22nd day of January, 2001.

CAPRICE COSPER

CAPRICE COSPER
Presiding Judge
339th District Court

# B

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

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No. 50,191-01

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EX PARTE JOSE ERNESTO MEDELLIN

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HABEAS CORPUS APPLICATION
FROM HARRIS COUNTY

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*The order was entered per curiam.*

ORDER

This is an application for writ of habeas corpus filed pursuant to the provisions of Art. 11.071, V.A.C.C.P.

On September 16, 1994, a jury found applicant guilty of capital murder. The jury returned answers to the punishment phase special issues and the trial court assessed punishment at death. This Court affirmed applicant's conviction on direct appeal. Medellin v. State. No. 71,977 (Tex.Cr.App. delivered March 19, 1997).

In the instant cause, applicant presents five allegations challenging the validity of his conviction and resulting sentence. The trial court has entered findings of facts

and conclusions of law recommending the relief sought be denied.

This Court has reviewed the record. The trial court's findings and conclusions are supported by the record and upon such basis the relief sought by the applicant is denied.

IT IT SO ORDERED THIS 3RD DAY OF OCTOBER, 2001.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-01-4078

JOSE ERNESTO MEDELLIN,

*Petitioner,*

—v.—

JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,

*Respondent.*

**ORDER**

Petitioner Jose Ernesto Medellin ("Medellin") filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his capital conviction and death sentence. (Docket Entry # 12). Pending before the Court is Respondent Janie Cockrell's ("Respondent") motion for summary judgment. (Docket Entry # 16). Having considered the record, the pleadings, and the applicable law, particularly the application of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the Court **grants** respondent's motion for summary judgment, **denies** Medellin's petition, and **denies** a Certificate of Appealability.

## BACKGROUND

On September 23, 1993, a Texas grand jury indicted Medellin for his role in the capital murder of Elizabeth Pena. The evidence in the guilt/innocence phase of trial showed that on June 24, 1993, Medellin and his fellow gang members raped and killed sixteen-year-old Elizabeth Pena and her fourteen-year-old friend, Jennifer Ertman. The evidence at trial, briefly summarized, showed that, after participating in a gang initiation, Medellin and other gang members encountered the victims walking along railroad tracks at approximately 11:30 p.m. Over the next hour, the gang repeatedly and viciously raped the two girls. The testimony at trial established that Medellin participated in the rape of both victims. The gang members then strangled the two girls to death. Trial testimony established that Medellin helped strangle Elizabeth Pena with one of his shoestrings. In describing the attacks later, Medellin appeared "hyper, giggling and laughing" as he recounted his role. Medellin also bragged about deflowering one of the young girls. The only remorse Medellin showed was that he did not have a gun so that the killing would have been quicker.[1]

The jury found Medellin guilty of capital murder.[2] In a separate punishment phase, the State presented evidence of Medellin's violent character and criminal offenses. Medellin had a long history of violent threats

[1] Medellin confessed to his participation in the rape and murder of the two girls. Medellin's confession portrays a more limited involvement in the crimes than he bragged about immediately after the killings. Medellin's confession, however, indicates that he participated in the rape of Elizabeth Pena and then helped another gang member strangle her.

[2] The State indicted Medellin under three different theories: capital murder of Elizabeth Pena in the course of a kidnaping; capi-

and misbehavior, often associated with the possession of firearms. The State also presented evidence that Medellin had been discovered with a "shank" in his cell while incarcerated pending trial. The defense's punishment phase case focused on testimony that Medellin had a good character and on an expert's opinion that he would not be a future danger to society. The jury answered Texas' special issues in a manner requiring the imposition of a death sentence.

The Court of Criminal Appeals denied Medellin's direct appeal from his conviction and sentence on March 19, 1997. *Medellin v. State*, No. 71, 997 (Tex. Crim. App. Mar. 19, 1997) (unpublished). Medellin did not seek *certiorari* review in the United States Supreme Court.

Medellin filed a state application for habeas corpus relief. The trial habeas court held that no controverted, previously unresolved issues existed and found it unnecessary to hold an evidentiary hearing. State Habeas Record at 177.[3] On January 22, 2001, the trial court signed the State's proposed findings and conclusions recommending that habeas relief be denied. State Habeas Record at 198-218. The Court of Criminal Appeals found that the record supported the lower court's findings and conclusions and, on that basis, denied relief. *Ex parte Medellin*, No. 50, 191-01 (Tex. Crim. App. Oct. 3, 2001).

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tal murder of Elizabeth Pena in the course of a robbery; and capital murder of Elizabeth Pena in the course of aggravated sexual assault. Tr. Vol. I at 6. The jury instructions provided for his conviction under any of those theories. Tr. Vol. I at 285-86. The jury returned a general verdict of guilty without specifying under which theory it convicted Medellin. Tr. Vol. I at 294.

[3] Judge Caprice Cosper presided over Medellin's trial and his state habeas proceedings.

On November 28, 2001, Medellin filed a preliminary federal petition for a writ of habeas corpus through appointed counsel. (Docket Entry # 5). On July 18, 2002, Medellin amended his habeas petition. (Docket Entry # 12). Medellin's amended petition raises five grounds for habeas relief:

1. Medellin's Sixth Amendment right to effective assistance of counsel was violated by trial counsel's[4] failure to present evidence of his good behavior while on juvenile probation, trial counsel's failure to present evidence of the parole eligibility accompanying a life sentence, and appellate counsel's[5] failure to seek enforcement of a trial court order allegedly precluding the State from seeking a death sentence;
2. The State violated Medellin's rights under the Vienna Convention by not protecting his right to consular access;
3. The State violated the Fourteenth Amendment by exercising its peremptory challenges in a discriminatory manne;
4. The State failed to disclose material exculpatory information to the defense; and
5. The trial court denied Medellin an impartial jury by excluding a potential juror for her opposition to capital punishment.

Respondent seeks summary judgment on the merits of Medellin's claims. (Docket Entry # 16). Medellin has

[4] Jack Millin and Linda Mazzagatti represented Medellin at trial. For the sake of clarity, the Court will generally refer to these attorneys conjunctively as "trial counsel."

[5] Randy McDonald represented Medellin on appeal. This Court will refer to him as "appellate counsel."

filed a response to the summary judgment motion. (Docket Entry # 24).

## STANDARDS OF REVIEW

Respondent seeks summary judgment in this case. In ordinary civil cases, summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." FED. R. Civ. P. 56(c); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747 (5th Cir. 1996). A petition for writ of habeas corpus is a civil action in federal court. *See Archer v. Lynaugh*, 821 F.2d 1094, 1096 (5th Cir. 1987). "As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). However, "[t]he Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules." *Woodford v. Garceau*, __ U.S. __, 123 S. Ct. 1398, 1402 (2003); *see also* Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts. In habeas proceedings, a court's summary judgment review is circumscribed by the AEDPA. *See Proctor v. Cockrell*, 283 F.3d 726, 729-30 (5th Cir. 2002).

The intent of the AEDPA is "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U. S. 685, 693 (2002); *see also Woodford* __ U.S. at __, 123 S. Ct. at 1401 ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases."). The AEDPA "embodies the principles of fed-

eralism, comity, and finality of judgments," *Evans v. Cockrell*, 285 F.3d 370, 374 (5th Cir. 2002), "substantially restrict[ing] the scope of federal review of state criminal court proceedings." *Montoya v. Johnson*, 226 F.3d 399,404 (5th Cir. 2000), *cert. denied*, 532 U.S. 1067 (2001); *see also Woodford v. Visciotti*, __ U. S. __, 123 S. Ct. 357, 360 (2002) ("[Section] 2254(d)'s highly deferential standard for evaluating state-court rulings . . . demands that state court decisions be given the benefit of the doubt."). In essence, the "AEDPA was enacted, at least in part, to ensure comity, finality, and deference to state court habeas determinations by limiting the scope of collateral review and raising the standard for federal habeas relief." *Robertson v. Cockrell*, 324 F.3d 297, 306 (5th Cir. 2003).

The AEDPA provides that a federal habeas petition shall not be granted with respect to any claim adjudicated on the merits in state court unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d)(1)-(2). Deference under the AEDPA differs depending on whether the state court engaged in a legal, factual, or mixed inquiry. *See Gachot v. Stalder*, 298 F.3d 414,417-18 (5th Cir. 2002).

Federal courts analyze questions of law and mixed questions of law and fact under 28 U.S.C. § 2254(d)(1) to determine whether the state court decision was either "contrary to" or an "unreasonable application" of

Supreme Court precedent. *See DiLosa v. Cain*, 279 F.3d 259, 262 (5th Cir. 2002); *Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). The Supreme Court holds that a state court decision is "contrary to" federal precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) "the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000); *see also Bell*, 535 U.S. at 698; *Early v. Packer*, __ U.S, __, 123 S. Ct. 362, 365 (2002). A state court may unreasonably apply federal law if it "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the particular facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to anew context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.[6]

A federal habeas court's review under 28 U.S.C. § 2254(d) "should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evi-

[6] An unreasonable application of federal law "is different from an *incorrect* application of federal law." *Id.* at 410. To provide relief, a federal habeas court must not only conclude that "the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411; *see also Woodford*, __ U.S. at __, 123 S. Ct. at 361 (differentiating between an incorrect state determination and an "unreasonable application of federal law"); *Valdez v. Cockrell*, 274 F.3d 941, 947 (5th Cir. 2001) ("Thus, a state court application maybe incorrect in our independent judgment and, yet, reasonable."), *cert. denied*, __ U.S. __, 123 S. Ct. 106 (2002).

dence." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 963 (2003). In reviewing the state court's substantive decision under the AEDPA, this court focuses on " 'determining the reasonableness of the state court's 'decision,' . . . not grading their papers.' " *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) (quoting *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001)), *cert. denied*, 535 U.S. 982 (2002); *cf. Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986) (observing that "federal courts do not sit as courts of appeal and error for state court convictions"). Thus, this Court bases its analysis on "the state court's ultimate conclusion, not on its reasoning process." *DiLosa*, 279 F.3d at 262; *Neal*, 286 F.3d at 246.

The AEDPA affords deference to a state court's resolution of factual issues. Under 28 U.S.C. § 2254(d)(2) "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]" *Miller-El v. Cockrell*, __ U.S. __, 123 S. Ct. 1029, 1043 (2003). A federal habeas court must presume the underlying factual determinations of the state court to be correct, unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Miller-El*, __ U.S. at __, 123 S. Ct. At 1036.[7]

Notwithstanding a petitioner's ability to show that a state court decision is erroneous under 28 U.S.C. § 2254(d), that does not guarantee that a petitioner is entitled to habeas relief. The language of 28 U.S.C.

[7] The AEDPA also established strict standards limiting the availability of evidentiary hearings in federal court. *See* 28 U.S.C. § 2254(e)(2). Medellin requests a hearing but has not shown that such a hearing is necessary to the adjudication of his claims. As the avail-

§ 2254(d) "does not *require* federal habeas courts to grant relief reflexively." *Robertson*, 324 F. 3d at 306; *see also Aleman v. Sternes*, 320 F.3d 687, 690-91 (7th Cir. 2003) (finding that 28 U.S.C. § 2254(d) does not entitle a petitioner to habeas relief). No Supreme Court case "hat[s] suggested that a writ of habeas corpus should automatically issue if a petitioner satisfies the AEDPA standard[.]" *Horn v. Banks*, 536 U.S. 266, 272 (5th Cir. 2002). A habeas corpus petitioner meeting his burden under 28 U.S.C. § 2254(d) must still comply with 28 U.S.C. § 2254(a): he must show that "he is in custody in violation of the Constitution or law and treaties of the United States." This includes a showing that any constitutional error at trial "had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Robertson*, 324 F.3d at 304 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)); *see also Aleman*, 320 F.3d at 690 ("Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though any error of federal law that may have occurred did not affect the outcome"). Habeas relief is also unavailable if it would require the creation of a new constitutional rule. *See Horn*, __ U.S. at __, 122 S. Ct. at 2151 (relying on *Teague v. Lane*, 489 U.S. 288 (1989)).

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ability of an evidentiary hearing is within the discretion of this Court, *see Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that it was "Congress' intent to avoid unneeded evidentiary hearings in federal habeas corpus"); Rule 8 of the Rules Governing Section 2254 Cases ("If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require."), this Court holds that there is no need for an evidentiary hearing in this case.

## ANALYSIS OF THE CASE

### I. Effective Assistance of Counsel

Medellin raises three claims criticizing his trial and appellate legal representation. Medellin first argues that trial counsel's representation in the punishment phase fell below constitutional norms when counsel failed to present evidence of his good probation history. Also, Medellin faults trial counsel for not alerting the jury to the fact that he would not be eligible for parole for at least thirty-five years if given a life sentence. Medellin finally faults appellate counsel for not seeking enforcement of an apparently erroneous order precluding the State from seeking the death penalty. The Texas courts rejected each of those claims. This Court will consider their merits under the relevant legal standards.

#### *A. Strickland standard*

The proper standard for evaluating the effectiveness of counsel is reasonable performance under prevailing professional norms. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984). In *Strickland*, the Supreme Court established a two-prong test for resolving ineffective assistance claims. Under that test, a defendant must show that counsel's performance was deficient and prejudicial to the defense. *Id.* at 687. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700. Both the performance and prejudice components of the ineffective assistance of counsel inquiry are mixed questions of law and fact. *See Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir.), *cert. denied*, 513 U.S. 960 (1994).

To establish deficient performance, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by

the Sixth Amendment." *Strickland*, 466 U.S. at 687. In reviewing ineffectiveness claims "judicial scrutiny of counsel's performance must be highly deferential," and every effort must be made to eliminate "the distorting effect of hindsight." *Id.* at 689.

A petitioner must also show that counsel's deficient performance resulted in a reasonable probability of a different result. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *See id.* However, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). Thus, in addition to establishing a reasonable probability of a different result, a petitioner must demonstrate that counsel's deficient performance rendered the result of the proceeding fundamentally unfair or unreliable. *See Vuong v. Scott*, 62 F.3d 673, 685 (5th Cir.) (citing *Lockhart*, 506 U.S. at 372), *cert. denied*, 516 U.S. 1005 (1995).

The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is on the petitioner. *See Montoya*, 226 F.3d at 408; *Jernigan v. Collins*, 980 F.2d 292, 296 (5th Cir. 1992), *cert. denied*, 508 U.S. 978 (1993). A petitioner's conclusory and speculative allegations will not suffice in this regard. *See Kinnamon v. Scott*, 40 F.3d 731, 734-35 (5th Cir.), *cert. denied*, 513 U.S. 1054 (1994); *Barnard v. Collins*, 958 F.2d 634, 643 n.11(5th Cit. 1992), *cert. denied*, 506 U.S. 1057 (1993). The Fifth Circuit has cautioned that

> [a] claim of ineffective assistance of counsel must be judged with eyes directly upon the reality of the situation facing defense counsel at the time of the acts and not years later. This discipline best assures faithful application of the objective measure of

> whether the decisions of defense counsel are within the range of those a reasonably competent lawyer might have made under those same facts and circumstances. It also takes us far along in judging its prejudice, if that inquiry is required.

*Black v. Cockrell*, 314 F.3d 752, 754-55 (5th Cir. 2002), *cert. denied*, __ U.S.__, __ S. Ct. __, 2003 WL 1235155 (April 21, 2003).[8] The Court will apply the above-stated standards to Medellin's ineffective-assistance-of-counsel claims.

B. *Failure to present evidence of good behavior while on juvenile probation*

During the punishment phase, trial counsel called several witnesses to present testimony that would support a

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[8] The Fifth Circuit's language echos the *Strickland* decision:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.... There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.
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> * * * *
>
> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.... The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.... [T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

*Strickland*, 466 U.S. at 689-90; *see also Williams v. Collins*, 16 F.3d 626,631 (5th Cir.), *cert. denied*, 512 U.S. 1289 (1994).

life sentence. These witnesses included former employers, friends, and family members. Medellin also called a psychologist whose testimony suggested that Medellin would not be a future danger to society. Medellin now argues that trial counsel provided ineffective assistance by not calling his former juvenile probation officer as a witness. Medellin contends that trial counsel should have presented his probation officer's testimony to show that he would not be a danger when placed under supervision, thus encouraging the jury to answer the special issues in a manner favoring a life sentence.

Medellin fails to support this claim with competent evidence. Claims of uncalled witnesses are not favored on habeas review because they are "largely speculative." *Evans*, 285 F.3d at 377. A petitioner raising such claims generally leaves a court to speculate on the exact nature of an uncalled witness' putative testimony. Here, Medellin has failed to provide this Court with any reliable indication of what testimony Medellin's former probation officer would have given if called as a witness. Medellin relies on an affidavit from his state habeas investigator stating that his probation officer, Maria Guerra, told her that Medellin "came on time" and that she "never had a problem" with him. (Docket Entry # 12, Exhibit F). Essentially, Ms. Guerra allegedly told the investigator that Medellin "did what he was supposed to do." (Docket Entry # 12, Exhibit F). What Medellin's former probation officer allegedly told his habeas investigator is hearsay, and Medellin has not shown that it falls under any exception to the hearsay rule. *Cf.* FED R. EVID. 802; *see also Herrera v. Collins*, 506 U.S. 390, 417-18 (1993) (holding on the facts of the case that affidavits containing hearsay statements obtained eight years after the habeas petitioner's trial were not sufficient to grant habeas relief). Absent the hearsay state-

ments in his investigator's affidavit, this Court is left with nothing but speculation concerning what a former probation officer may have added to Medellin's defense. This claim could be rejected on that basis alone.

Even assuming that the hearsay statements are reliable, Medellin fails to show an entitlement to habeas relief. The state habeas court issued several factual findings commenting on the potential impact of the putative evidence:

> 42. The Court finds, based on the appellate record, that information, if any, that the applicant was punctual for appointments with his juvenile probation officer and did not cause his probation officer any problems is inconsequential in light of the overwhelming evidence of the applicant's prior history and in light of the brutality of the offense which the applicant committed.
>
> 43. The Court finds, based on the appellate record, that information, if any, that the applicant presented no problems for his probation officer does not establish that the applicant does well when supervised and does not establish that such evidence is indicative of the applicant's behavior in prison if he received a life sentence, in light of the extensive evidence showing the applicant's repeated illegal activities and inability to function in structured environments, including jail.

State Habeas Record at 207, ¶¶42, 43. The state habeas court concluded that the absence of the probation evidence did not meet either prong of the *Strickland* analysis. State Habeas Record at 215, ¶9. That decision was neither contrary to, nor an unreasonable application of, federal law.

Trial evidence portrayed Medellin as an extremely violent and depraved individual. The State presented extensive evidence that Medellin consistently broke the law, often in a violent manner. Medellin participated in the brutal gang rape and murder of two young girls. As noted by the Court of Criminal Appeals on direct review, "[t]he facts of the case are brutal and barbaric enough to alone support the jury's answer to the [future dangerous] special issue." Opinion on Direct Review ("Opinion") at 7. The mere fact that Medellin was prompt at his probation appointments and never caused his probation officer problems would not overcome the substantial, nearly overwhelming, evidence of his future dangerousness.

The punishment phase evidence rebuts Medellin's insistence that the probation officer's testimony could have shown that he would not be a threat in a structured environment. The State presented evidence that, while incarcerated pending trial, Medellin secreted weapons in his cell. Medellin's own actions refute any inference that he would not be violent in prison. In light of the depraved nature of the offense, his highly violent character, and his poor behavior while incarcerated, the fact that Medellin was not tardy at his probation meetings does not create a reasonable probability that the jury would not find him to be a future danger. The state court's decision was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). This claim is denied.

C. *Failure to emphasize the parole eligibility accompanying a life sentence*

Medellin also faults counsel for not making the jury aware, either through voir dire questioning or through a jury instruction, that Texas law provided for parole only after thirty-five years incarceration if the jury returned

a life sentence. The trial court indicated to the defense that it would be willing to allow parole eligibility information to come before the jury. Tr. Vol. 27 at 12. Trial counsel Ms. Mazzagatti told that court that her co-counsel Mr. Millin

> has already articulated to the Court his reasons for not wanting to pursue the basis of informing the jurors of the 35 years because he had previously, based on his experience in six other capital murder trials, polled jurors and found that they believe that it was truly a life sentence. And so he thought as a strategy he would not proceed with the advising people on the 35 years.

Tr. Vol. 27 at 12-13. Medellin now argues that trial counsel's failure to present evidence of parole eligibility meets both prongs of the *Strickland* analysis.

The state habeas court held that trial counsel made a strategic decision not to inform the jury about parole eligibility. The state habeas court concluded that "[t]rial counsel are not ineffective for making the reasonable, strategic decision, based on prior experience, not to request that the jury be informed and instructed concerning parole eligibility, an instruction which would make the jury aware that the eighteen-year old applicant would be eligible for parole at the relatively young age of forty-three." State Habeas Record at 215-16, ¶ 11.[9] The state habeas court's decision was not contrary to, or an unreasonable application of, federal law.

[9] The Court notes that the state habeas court erred in its mathematical computation of at what age Medellin would be eligible for parole. Nonetheless, the same principle applies whether Medellin would be released in his forties or his fifties—he could still commit a violent crime.

Trial counsel apparently hoped to leave the jury with the impression that a life sentence meant just that—life-long incarceration. The integrity of trial counsel's choice is reflected in concerns raised by the Fifth Circuit in other cases: that a jury's knowledge that the defendant could one day return to society may " 'predispose[ ] them to impose a death penalty.' " *Woods v. Johnson*, 75 F.3d 1017, 1037 (5th Cir.) (quoting *King v. Lynaugh*, 850 F.2d 1055, 1060 (5th Cir. 1988)), *cert. denied*, 519 U.S. 854 (1996). Indeed, as noted by the Fifth Circuit in another case, the petitioner's

> crime, and his revelry in it, leave no room for hypothesizing that a jury, faced with the information about parole for which [the petitioner] contends, would have been more lenient. If anything, given the egregious nature of this case, a suggestion to prospective jurors that [the petitioner] might return to society in [thirty-five] years could very easily have predisposed them to impose a death sentence.

*King*, 850 F.2d at 1061. This concern is amplified in this case due to Medellin's youth at the time of the murders. Trial counsel made a choice not to risk the chance that a jury would not view thirty-five years as an appropriate amount of time before parole, and thus return a death sentence.

The Supreme Court has recognized that "[i]n a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole." *Simmons v. South Carolina*, 512 U.S. 154, 168 (1994). Trial counsel based his decision not to inform the jury of parole eligibility on his prior experience and on objectively

defensible strategy. As Medellin failed to show that the state habeas court's decision was contrary to or an unreasonable application of federal law, this claim is denied. *See* 28 U.S.C. § 2254(d)(1).[10]

D. *Failure to seek enforcement on appeal of the trial court's order allegedly precluding the State from seeking a death sentence*

Prior to trial, Medellin filed a "Motion to Preclude Prosecution from Seeking the Death Penalty." Tr. Vol. I at 95-107. Medellin's motion argued that Texas should not be permitted to seek the death penalty against him because of various perceived deficiencies in the capital sentencing statute. On September 9, 1994, the trial court held a hearing to address various pre-trial motions. There, the following interchange occurred:

> Trial counsel: Your Honor, could we start with the Motion to Declare the Texas Capital Sentencing Scheme Unconstitutional and Motion to Preclude the Imposition of the Death Penalty because these will probably be—

[10] The state habeas court also found that Medellin failed to show that he was prejudiced by trial counsel's failure to offer evidence or question about parole eligibility. State Habeas Record at 216, ¶12. Medellin's response to the summary judgment motion relies on studies showing that a jury's correct knowledge of parole eligibility increases the likelihood of them imposing a life sentence. Considering the overwhelming evidence that supported a death sentence in this case, and the brutal nature of the murders, there is no reasonable probability that a jury would return a life sentence had it known about the lengthy time before Medellin would be eligible for parole.

Trial court: That will be denied. All right. What else?

Trial counsel: Then the next one, Your Honor, will be the Motion to Preclude the Prosecution from Seeking the Death Penalty.

Trial court: That will be denied.

Tr. Vol. 27 at 9. When the trial court signed the defense's proposed order that day, however, the trial judge initialed the line indicating that the motion to preclude the death penalty had been granted. Tr. Vol. I at 108. Neither trial nor appellate counsel seized on the written order as an opportunity to avoid a capital conviction.

Medellin argues that the written order of the trial court was enforceable and should have prevented his capital prosecution. Medellin faults his appellate counsel for not identifying the existence of the challenged order in the record. Medellin contends that appellate counsel rendered ineffective assistance by not asking the Court of Criminal Appeals to vacate his death sentence because the trial court initialed the portion of his written order that would prevent his capital prosecution, even when the trial court clearly evinced on the record the intent to deny the motion.

Medellin raised this claim on state habeas review. There, the same court which presided over his trial issued the following factual finding: "The Court finds, based on its personal recollection, that the written order notation on the applicant's motion to preclude the State from seeking the death penalty is an inadvertent error." State Habeas Record at 204, ¶31.[11] On that basis, the

[11] The trial court additionally found "based on the applicant's trial in which the State sought the death penalty and on the applicant's

court denied habeas relief. State Habeas Record at 215, ¶8. This conclusion is neither contrary to, nor an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

The state habeas court explicitly found its notation on the written order was inadvertent. This Court must presume that finding to be correct unless Medellin shows clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(l). Medellin has not produced any evidence that would suggest that the trial court intended to prevent the State from seeking a death sentence. The record itself, most particularly the interchange where the trial court orally denied the motion, supports the conclusion that the written order reflects an inadvertent error. Nothing would indicate that the trial court meant to prevent the State from seeking a death sentence.

An appellate attorney cannot be faulted for not raising meritless claims. *See United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999) ("An attorney's failure to raise a meritless argument thus cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue."); *Williams v. Collins*, 16 F.3d 626, 634 (5th Cir.), cert. denied, 512 U.S. 1289 (1994). "Failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir.), *cert. denied*, 513 U.S. 966 (1994); *see also Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998) ("[F]ailure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness

resulting death sentence, that the inadvertent error on the written order accompanying the applicant's motion to preclude the State from seeking the death penalty was rendered moot by the applicant's trial and subsequent sentence of death." State Habeas Record at 204, ¶33.

. . ."), *cert. denied*, 525 U.S. 1174 (1999). The trial court obviously made an inadvertent mistake in signing the order upon which Medellin now relies. Appellate counsel had no chance of crafting that into a viable, meritorious appellate argument. The state habeas court's rejection of this claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). This claim is denied.

## II. Vienna Convention

Medellin is a citizen of Mexico. Medellin contends that he was never given consular access before, during, or after his trial. Medellin maintains that this denial of consular assistance violated his rights under the Vienna Convention on the Law of Treaties, May 22, 1969, art. 31(1), 8 I.L.M. 4 (1969) ("Vienna Convention"). Because of this denial, Medellin asks this Court to order that a new trial be held.

Medellin presented this claim on state habeas review. The state habeas court held that Medellin failed to object to the violation of the Vienna Convention at trial. On that basis, the state habeas court concluded that his failure to properly preserve the claim waived his right to assert the claim on post-conviction review. State Habeas Record at 210, ¶ 13.[12] Respondent argues that the state habeas court's reliance on an independent and adequate state procedural rule, *i.e.*, Texas' contemporaneous

[12] The state habeas court also considered the merits of Petitioner's Vienna Convention claim. A state court's alternative adjudication of a claim on the merits does not vitiate the validity of its procedural bar. *See Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir.) ("It is clear in this Circuit that alternative rulings do not operate to vitiate the validity of a procedural bar that constitutes the primary holding."), *cert. denied*, 525 U.S. 1049 (1998).

objection rule, bars federal consideration of Medellin's Viena Convention claim.

The Fifth Circuit "has consistently held that the Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims." *Fisher v. State*, 169 F.3d 295, 300 (5th Cir. 1999); *see also Sharp v. Johnson*, 107 F.3d 282, 285-86 (5th Cir. 1997); *Nichols v. Scott*, 69 F.3d 1255, 1280 n.48 (5th Cir. 1995), *cert. denied*, 518 U.S. 1022 (1996); *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir.), *cert. denied*, 516 U.S. 1005 (1995). Medellin, however, argues that Vienna Convention claims are exempt from the constrains of the procedural default doctrine.

In *Breard v. Greene*, 523 U.S. 371 (1998), the Supreme Court considered the effect of the procedural default doctrine on a prisoner's Vienna Convention claim. Recognizing that federal courts "should give respectful consideration to the interpretation of an international treaty rendered by an international court," the Supreme Court nonetheless found that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* at 375.[13] The Supreme Court held that the procedural default doctrine could bar consideration of a Vienna Convention claim. *See id.* at 375-76. The Supreme Court supported this finding by recognizing that the procedural default doctrine applied

[13] The Supreme Court noted that "[t]his proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.' " *Breard*, 523 U.S. at 375 (quoting Article 36(2), [1970] 21 U.S. T., at 101]).

even to claims brought under the United States Constitution—a document " 'on full parity with a treaty.' " *Id.* ay 376 (quoting *Reid v. Covert*, 354 U.S. 1, 8 (1957)). The Supreme Court also expressed doubt that any Vienna Convention claim could be successful absent "some showing that the violation had an effect on the trial." *Breard*, 523 U.S. at 377 (citing *Arizona v. Fulminate*, 499 U.S. 279 (1991)). The *Breard* decision would allow Medellin's failure to comply with Texas' contemporaneous objection rule to bar federal review of this claim.

Medellin, however, argues that a case decided in the International Court of Justice ("ICJ") abrogates reliance on a procedural bar in rejecting Vienna Convention claims. In the *LaGrand Case (Germany v. United States)*, 2001 I.C.J. 104, the ICJ found that the procedural default rule itself did not violate the Vienna Convention. *See LaGrand Case*, 2001 I.C.J. 104, at ¶90.[14] The ICJ, however, condemned the application of the procedural default rule when "it prevent[ed] 'full effect [from being] given to the purposes for which the rights accorded under [the Vienna Convention] are intended." *Id.* at ¶91. The ICJ held that, because of "the failure of the American authorities to comply with their obligation" under the Vienna Convention, "the procedural default rule prevented [LaGrand] from attaching any legal significance" to the State's violation of the Vienna Convention. *Id.* According to Medellin, the effect of the *LaGrand Case* is that "procedural default rules may not be invoked to deny merits-based review of [a Vienna Convention] violation." (Docket Entry # 24 at 21).

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[14] The ICJ previously entered an order requiring the United States to ensure that LaGrand was not executed. Arizona executed LaGrand in 1999. The ICJ did not enter its final judgment in the *LaGrand Case* until 2001.

Medellin forfeited consideration of his Vienna Convention claim by failing to comply with an adequate and independent state procedural rule. The Supreme Court has long held that such procedural rules bar federal consideration of defaulted claims, except under narrow exceptions. Medellin's reliance on the *LaGrand Case* would create a wholesale exception to procedural limitations when a petitioner raises Vienna Convention claims—potentially invalidating well-settled law such as the AEDPA's insistence on the exhaustion of remedies and the timely presentation of claims. The concerns of comity, federalism, and finality of state judgements suggest that this Court refrain from jettisoning the procedural bar doctrine until the Supreme Court reconciles its caselaw with the ICJ action in the *LaGrand Case*. This Court is simply wary of finding that the ICJ overruled entrenched Supreme Court precedent.[15]

Even if this Court were to consider the merits of the claim, Medellin is not entitled to federal habeas relief The state habeas court found that Medellin "as a private individual, lacks standing to enforce the provisions of the Vienna Convention." State Habeas Record at 216, ¶15. Federal law supports the state habeas court's rejection of this claim. The preamble to the Vienna Convention explains that it is "not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States . . . ." On that basis, the Fifth Circuit has refused to recognize that the

[15] The wisdom in this approach is suggested by the fact that the Supreme Court refused to stay LaGrand's execution, notwithstanding the fact that the ICJ ordered the United States to "take all measures at its disposal to ensure that [LaGrand] is not executed pending the final decision in these proceedings." *LaGrand Case*, 2001 I.C.J. 104, at 32. The Supreme Court's refusal to stay LaGrand's execution raises substantial questions concerning its own view of the ICJ's ability to intrude in American legal proceedings.

Vienna Convention "creates judicially enforceable rights of consultation between a detained foreign national and his consular office." *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.), *cert. denied*, 533 U.S. 962 (2001).[16] If this Court were to recognize that the Vienna Convention created a personally-enforceable right, such a finding would create a new rule of law, violating the non-retroactivity principle of *Teague v. Lane*. *See Flores v. Johnson*, 210 F.3d 456, 457-58 (5th Cir. 2000) (finding that any recognition of enforceable, individual rights under the Vienna Convention would amount to a new rule of law in violation of Teague's non-retroactivity principle), *cert. denied*, 531 U.S. 987 (2000). The ICJ's rejection of the procedural default doctrine in Vienna Convention cases did not purport to overrule the

[16] In *Beard*, the Supreme Court considered whether the Vienna Convention provided a private, enforceable right. Finding the claim procedurally barred, the Supreme Court did not directly rule on the claim. While the Supreme Court noted that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest[,]" the Supreme Court left the resolution of that issue to the lower courts. 523 U.S. at 376. Since 1970, the United States Department of State has interpreted the Vienna Convention as not creating enforceable individual rights. *See United States v. Li*, 206 F.3d 56, 63 (1st Cir.), *cent. denied*, 531 U.S. 956 (2000). The federal circuit courts that have considered the issue have generally refused to address the merits of the question, instead finding that the defendant failed to demonstrate prejudice or sought an unavailable remedy. *See United States v. De La Pava*, 268 F.3d 157, 164-66 (2nd Cir. 2001); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986-88 (10th Cir. 2001); *United States v. Page*, 232 F.3d 536, 540 (6th Cir.), *cert. denied*, 532 U.S. 935 (2001); *United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000); *United States v. Chanthadara*, 230 F.3d 1237, 1255 (10th Cir. 2000), *cert. denied*, 122 S. Ct. 457 (2001); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000), *cert. denied*, 531 U.S. 1131 (2001). No circuit court has held that the Vienna Convention creates valid, enforceable individual rights.

Supreme Court's weighty Teague jurisprudence. This Court, therefore, cannot grant habeas relief on Petitioner's Vienna Convention claim.

Even if procedural law and non-retroactivity principles did not mandate the denial of this claim, and the Court were to assume that the Vienna Convention created an enforceable right, Petitioner would have to show concrete, non-speculative harm for the denial of his consular rights. *See Breard*, 523 U.S. at 377; *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996), *cert. denied*, 519 U.S. 995 (1996). When a Vienna Convention claim is "properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." *Breard*, 523 U.S. at 377. Medellin contends that the Mexican Consular would have taken immediate steps to secure representation for him and would have advised him not to confess to the rape and murder of the two young girls.

The state habeas court, however, found that Petitioner "fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [Medellin] was provided with effective legal representation upon [his] request; and, [his] constitutional rights were safeguarded." State Habeas Record at 217, ¶ 16. Petitioner has not shown that this determination was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). Medellin's allegations of prejudice are speculative. The police officers informed Medellin of his right to legal representation before he confessed to involvement in the murders. Medellin waived his right to advisement by an attorney. Medellin does not challenge the voluntary nature of his confession. There is no indication that, if informed of his consular rights, Medellin would not have

waived those rights as he did his right to counsel. Medellin fails to establish a "causal connection between the [Vienna Convention] violation and [his] statements." *United States v. Ortiz*, 315 F.3d 873, 886 (8th Cir. 2002). Petitioner has failed to show prejudice for the Vienna Convention violation.[17] This claim is denied.

## III. *Batson* Claim

Medellin claims that the State violated his constitutional rights through the discriminatory use of peremptory challenges. Medellin first raised the issue of discrimination when the State used a peremptory challenge to excuse potential juror Elizabeth Ann Berry. Medellin raised a *Batson*[18] challenge, contending that the State only struck Ms. Berry because she was an African-American woman. Tr. Vol. 20 at 227. After Medellin raised the *Batson* challenge, the following exchange occurred:

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[17] Furthermore, Petitioner has not demonstrated that a new trial would bean appropriate remedy under the Vienna Convention. The Vienna Convention does not articulate a specific remedy for its violation. *See Jimenez-Nava*, 243 F.3d at 199. Federal courts generally hold that Vienna Convention violations do not require the dismissal of an indictment or the suppression of evidence. *See De La Pava*, 268 F.3d at 164-66; *Page*, 232 F.3d at 540-41; *Cordoba-Mosquera*, 212 F.3d at 1195-96; *Li*, 206 F.3d at 61-62. The Fifth Circuit has held that reversal is not an appropriate remedy when trial counsel had access to the same information as consular officials. *See Faulder*, 81 F.3d at 520. The Fifth Circuit has also rejected the suggestion that the exclusionary rule should prevent the introduction of confessions taken in violation of the Vienna Convention. *See Jimenez-Nava*, 243 F.3d at 197-98. No court has reversed a capital conviction or set aside a death sentence on the basis of a Vienna Convention violation. This Court questions its ability to overturn Medellin's conviction and sentence under the Vienna Convention, especially in light of his failure to demonstrate prejudice.

[18] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Trial court: Mr. Millin, that's plenty. If you want to put something in rebuttal, that's fine. But there's a Batson challenge on the table. Mr. Vinson, do you want to go ahead and—I will ask that the State, regardless of a prima facie showing, put its explanation on the record at this time because its fresh in everybody's mind. Mr. Millin, if you want to reurge your Batson motion at a later time. The jury (sic) is not clearly the reason of selecting a capital murder jury.

The State: I guess the main issue and problem that I have with Ms. Berry is that she has two brothers of which both have been involved in drugs. Both have been to the penitentiary. One, I think, has been on numerous occasions, she testified to. And I think one is released on parole at this time and one is in custody at the penitentiary at this time as well. Moreover, I did not feel comfortable with Mrs. Berry's characterization of the prosecutors as on the attack and defense attorneys as being the underdog. And throughout this trial, I would have a perception in my mind to present my case to Mrs. Berry, she's looking at the defendant as the underdog and I'm the one on attack, like a wild mongrel.

Tr. Vol. 20 at 227-28. The prosecutor also provided relevant personal information relating to his choice of strikes:

> The State: Moreover, your Honor, the record as been silenced on my color. The prosecutor in this case, I would like the record to reflect is a black prosecutor and has an appreciation of blacks serving on juries, having grown up during the 40's, 50's, 60's, 70's, 80's, and 90—
>
> Trial court: Are you saying you're an old black prosecutor?
>
> The State: That's right.
>
> Trial court: Let the record reflect that Mr. Vinson is African American and he is old. However, he is—
>
> The State: And youthful in appearance.
>
> Trial court: However, he looks much younger than his years.

Tr. Vol. 20 at 228-29. In rebuttal, the defense argued that Mrs. Berry expressed an ability to be impartial notwithstanding her brothers' criminal record. Tr. Vol. 20 at 229. The trial court then denied the *Batson* challenge to Mrs. Berry as follows:

> Trial court: Let me state that I do not believe that there's a prima facie showing that's been made at this time. However, I find based on observing Ms. Berry's demeanor and her responses and viewing her questionnaire, that Mr. Vinson's reason[s] proffered are

> racial, neutral reasons. At this time, I will deny any Batson motion. If you'd like to, Mr. Millin, reurge your Batson challenge at the end of the jury selection, I will reconsider it at that time as well. However, let the record reflect at this time-still at this time, our nine-man jury is comprised of a black female, a Hispanic male, a Hispanic female, a black male.... And so there's no indication of gender bias. There are—the composition of males to females are a black female, a white female, a Hispanic female, a white female; and with regard to men, Hispanic male, a white male, a black male, and a second white male.

Tr. Vol. 20 at 230-3 1.

Medellin next raised a peremptory challenge when the State excused potential juror Rafael Rodriguez with a peremptory strike. The trial court found that Medellin made a prima facie case for the purposes of *Batson* by noting that the potential juror was Hispanic and had generally stated that he could be impartial. Tr. Vol. 21 at 117. The State then explained the motivation for striking Mr. Rodriguez:

> The State: My reason for striking Mr. Rodriguez is there was a great deal of hesitation with his explanation on the death penalty when he was speaking with you. He's also for the death penalty without any compulsion whatsoever if it happened to

> one of his relatives. I still do not have a full understanding of his position on the death penalty. With respect to the question I asked him, he gave me a philosophical—he gave a theological and Biblical and his own philosophy. One of the things put me on edge, turning the cheek, you turning the other cheek. That goes back to the philosophy if you're slapped, you turn the other cheek. I'm afraid he may be looking to turn the other cheek in this case, and I don't want it turned in my favor.

Tr. Vol. 21 at 117-18. The trial court found that to be a race-neutral explanation and denied the *Batson* challenge. Tr. Vol. 21 at 118.

After the parties selected the jury panel, Medellin filed a "Motion to Strike Jury Panel." Tr. Vol. I at 260. According to Medellin's count, the State struck eight men and five women. Five of those excluded white, six were black, and two were Hispanic.[19] Medellin argued that the State based its voir dire strategy on removing minorities and men from the jury panel.

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[19] In his motion, Medellin noted that the State exercised its peremptory challenges against the following prospective jurors: Kirven O'Neal Tillis, a black male; Mary Freeman, a white female; Kathy Felder, a black female; Bernard Richardson, a black male; Walter Wynn Martin, a white male; Andra McCoy, a black male; Marie Clark, a white female; Vasline Dickie, a black male; Christine Rossie, a white female; Raford Earl Gresham, a white male; Porfirio Rodriguez, a hispanic male; Elizabeth Ann Berry, a black female; and Rafael Rodriguez, a hispanic male. Tr. Vol. I at 264.

On August 17, 1994, the trial court discussed Medellin's motion to strike the panel in a pretrial hearing. In that hearing, the defense asked the court to quash the entire panel because the State allegedly used its peremptory challenges in a discriminatory manner. Tr. Vol. 26 at 11-12. The State responded to that allegation:

> The State: Your Honor, I think the record will reflect too the final disposition of that jury again is a melting pot jury. And while the State exercised those strikes, I think it was 13—I don't have mine with me right now. But those are all race neutral strikes.

Tr. Vol. 26 at 12-13. At that point, the trial court went off the record. The record from that hearing does not reflect any further on-the-record discussion of the *Batson* issue. On August 19, 1994, the trial court entered a written order denying Medellin's motion to strike the jury panel. Tr. Vol. I at 267.

*A. Claim raised on direct review*

On direct appeal, Medellin raised a single Batson claim. Medellin argued that the State violated the equal protection clause with respect to the peremptory strike of Mr. Rodriguez.[20] The Court of Criminal Appeals recog-

[20] Medellin raised this claim under *Batson* and under the relevant state statute prohibiting the use of race-based peremptory challenges. While the Court of Criminal Appeals found that Medellin failed to preserve error on his state law claim, the Court of Criminal Appeals considered the merits of his *Batson* argument. Apparently anticipating that Respondent would rely on the procedural default doctrine to bar this claim, Medellin now argues that appellate counsel rendered ineffective assistance by failing to present a broad *Batson* claim on direct review. Medellin has not shown that he was prejudiced by this failure. Aside from the fact that he fails to show

nized that the trial court found that Medellin made a prima facie case for discrimination. Opinion at 12. The Court of Criminal Appeals then noted that the State gave a race-neutral explanation for the challenge to Mr. Rodriguez: that his opinion on the death penalty would not make him an attractive juror for the State. Opinion at 12. The Court of Criminal Appeals found that

> [t]he trial court accepted these reasons as race-neutral and appellant made no attempt to rebut the explanations given or otherwise explain why they were only pretexts for discrimination. A review of the entirety of the veniremember's voir dire reveals that the prosecutor's reasons were supported by the record. Given this, we cannot say that the judge's ruling in this instance was clearly erroneous.

Opinion at 12.

Medellin renews his *Batson* claim against Mr. Rodriguez in his federal petition. Medellin argues that the lack of clarity in Mr. Rodriguez's opinion on the death penalty does not provide a race-neutral basis for a peremptory strike. Medellin argues that the trial court should have required additional questioning of Mr. Rodriguez. The record indicates, however, that the peremptory strike of Mr. Rodriguez complied with the Supreme Court's *Batson* jurisprudence.

Under *Batson v. Kentucky*, 476 U.S. 79 (1986), the State violates the equal protection clause when it chal-

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that a *Batson* violation actually existed, Medellin presented the *Batson* claim on state habeas review where it received full consideration by the Court of Criminal Appeals. The state habeas court rejected that claim. There is no reason to suppose that the claim would have fared better on direct review. Medellin fails to show *Strickland* prejudice with respect to the ineffective-assistance-of appellate counsel nuance of his *Batson* claim.

lenges potential jurors solely on the basis of race. A court addresses *Batson* claims under a three-step burden shifting scheme:

> [t]he process for evaluating an objection under *Batson* requires that (1) a defendant make a prima facie showing that the prosecutor has exercised his peremptory challenges on the basis of race, (2) the burden then shifts to the prosecutor to articulate a race-neutral reason for excusing the juror in question, and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

*Thompson v. Cain*, 161 F.3d 802, 810-11 (5th Cir. 1998); *see also United States v. Montgomery*, 210 F.3d 446, 453 (5th Cir. 2000); *United States v. Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993). " 'The 'shifting burden' described in the *Batson* framework is one of production only.' The party asserting the claim of purposeful discrimination always shoulders the ultimate burden of persuasion." *Soria v. Johnson*, 207 F.3d 232, 239 (5th Cir.) (quoting *Bentley-Smith*, 2 F.3d at 1373), *cert. denied*, 530 U.S. 1286 (2000); *see also Lockett*, 230 F.3d at 707 (citing *Batson* and stating that "[t]he burden of demonstrating that a constitutional violation occurred is, or course, on a habeas petitioner.").

In the instant case, the trial court called on the State to provide a race-neutral explanation for the use of the peremptory strike against Mr. Rodriguez. "Once a court has taken that step, we no longer examine whether a prima facie case exits." *United States v. Webster*, 162 F.3d 308, 349 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999). This Court's "decision, then, must rest on (1) whether the government articulated race-neutral explanations for the exercise of its challenges and (2) whether

[the petitioner] has demonstrated that those justifications are pre-textual and that the government engaged in purposeful discrimination." *Id.*

As previously noted, the State offered several reasons for its peremptory strike of Mr. Rodriguez that were not based on his race. Under the second part of the *Batson* burden-shifting scheme, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (finding the prosecution's explanation that the potential juror had long hair and a beard to be a sufficient race-neutral explanation for the purposes of the second step of the *Batson* analysis); *see also Hernandez v. New York*, 500 U.S. 352, 359-60 (1991).[21] "In such cases, a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.*; *see also Miller-El*, __ U.S. at __, 123 S. Ct. at 1040 ("In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible.").

Medellin now disputes the reasons proffered by the State, pointing to Mr. Rodriguez's testimony in an attempt to show that the State's reasons were baseless or warranted further questioning. "[T]he ultimate inquiry for the judge is not whether counsel's reason is suspect, or weak, or irrational, but whether counsel is telling the

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[21] "Under *Batson*, a prosecutor's explanation for a peremptory strike need not rise to the level of a challenge for cause; rather, it merely must contain a clear and reasonably specific articulation of legitimate reasons for the challenge." *United States v. Clemons*, 941 F.2d 321, 325 (5th Cir. 1991). At the second step, the "race-neutral explanation tendered by the proponent need not be persuasive, or even plausible." *United States v. Huey*, 76 F.3d 638, 641 (5th Cir. 1996). Indeed, the explanation "simply must be race-neutral and honest." *Webster*, 162 F.3d at 349.

truth in his or her assertion that the challenge is not race-biased." *Bentley-Smith*, 2 F.3d at 1375. In *Batson* the Supreme Court noted that the finding of intentional discrimination is a factual finding that "largely will turn on evaluation of credibility." *Batson*, 476 U.S. at 98 n.21. In making such determinations, the trial court evaluates the State's explanation, but also observes the demeanor of the prosecutor and the prospective jurors. *See Jones v. Butler*, 864 F.2d 348, 369 (5th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989); *Hernandez*, 500 U.S. at 365 (stating that "the best evidence often will be the demeanor of the attorney who exercises the challenge"). "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El*, __ U.S. at __, 123 S. Ct. at 1040. In essence, "the decisive question will normally be whether a proffered race-neutral explanation should be believed." *Bently-Smith*, 2 F.3d at 1373.

A state court's credibility determinations are afforded "significant deference" on federal review, especially in light of the AEDPA. *See Miller-El*, __ U.S. at __, 123 S. Ct. at 1041.[22] Under the AEDPA, a petitioner bears the substantial burden of showing that a state court erred in its credibility determination. *See id.* at __, 123 S. Ct. at 1041-42. This Court is bound by the factual findings of the Court of Criminal Appeals unless Medellin can demonstrate by clear and convincing evidence that the

[22] This deference does not suggest an abdication of judicial review. *See Miller-El*, __ U.S. at __, 123 S. Ct. at 1041. A federal court may reject a state credibility finding so long as a petitioner complies with the AEDPA's stringent standards. *See id* at __, 123 S. Ct. at 1041.

presumption of correctness should not apply. *See* 28 U.S.C. § 2254(e)(1).

Under *Batson's* final step, Medellin ultimately bears the burden of establishing that the government engaged in "purposeful discrimination" based on race. *Purkett*, 514 U.S. at 767; *Bentley-Smith*, 2 F.3d at 1373. Here, Medellin "offers no direct evidence of purposeful discrimination, but rather argues that the government's proffered reasons are pretextual. . . ." *Id.* Medellin attempts to prove his case by demonstrating an absence of record support for the reasons offered by the State; however, even if the reasons advanced by the State are only weakly supported by the record, the thrust of this Court's analysis concerns the State's intent in seeking the peremptory strike. *See Bently-Smith*, 2 F.3d at 1373-74 (stating that as a general rule, "[t]here will seldom be any evidence that the claimant can introduce—beyond arguing that the explanations are not believable or pointing out that similar claims can be made about non-excluded jurors who are not minorities"). While Medellin now asks this Court to find that the reasons advanced by the State during jury selection were pretextual, he must also demonstrate that the State engaged in purposeful discrimination on the basis of race or gender. The record supports a finding that the State did not exercise its peremptory challenge on account of race or gender. The State struck Mr. Rodriguez for his opinion on the death penalty. That excuse is sufficiently race-neutral to survive a *Batson* challenge.

After a review of the record, this Court finds Medellin has not demonstrated why the deference to the trial judge's implicit determination concerning the prosecution's intent should be called into doubt. Accordingly, Medellin has not provided clear and convincing evidence that the state court findings were incorrect. *See* 28

U.S.C. § 2254(e)(1). Medellin has also failed to demonstrate that the state court's decision rejecting the *Batson* claim against Mr. Rodriguez was "an unreasonable determination of the facts in light of the evidence. . . ." 28 U.S.C. § 2254 (d)(2).

B. *Claim raised on state habeas review*

On state habeas review, Medellin raised the expansive *Batson* claim which he now presents in his federal petition. As opposed to the challenge to Mr. Rodriguez's dismissal raised on direct review, Medellin's state habeas claim broadly challenged the State's motive in exercising all of its peremptory challenges. Medellin argued that he made a prima facie showing that the State's practice in jury selection was to remove all African American and male jurors. To establish the alleged pattern of discriminatory strikes, Medellin relied only on the fact that the State used six of its thirteen peremptory strikes to remove minority potential jurors and also used eight to excuse men, resulting in a pattern of discriminatory strikes. Medellin also criticized the trial court for not making the State provide a race-neutral reason for each of those strikes when he raised the issue after the impanelment of the jury.

The state habeas court rejected this claim. The state habeas court first reviewed the voir dire of Elizabeth Ann Berry, the only potential juror other than Mr. Rodriguez specially identified by Medellin on habeas review as being subject to a discriminatory strike. The state habeas court found that the State's explanation for striking Ms. Berry, that she had brothers who were incarcerated and displayed a manner favoring the defense, was race neutral. State Habeas Record at 199, ¶¶ 5-9, 11. The state habeas court also relied heavily on the prosecutor's credibility. The state habeas court noted that the

prosecutor was himself black. State Habeas Record at 200, ¶10. The state habeas court specifically noted previous cases in which the prosecutor had exercised peremptory challenges without discriminatory motive. State Habeas Record at 202-03, ¶¶25-26.

The state habeas court concluded that Medellin's motion in which he merely described the composition of the peremptory strikes failed to establish a prima facie case of discrimination. State Habeas Record at 213, ¶3. The state habeas court found that the prosecution employed racially-neutral strikes. State Habeas Record at 214, ¶¶4-5. Accordingly, the state habeas court also found that appellate counsel's failure to raise a broad *Batson* claim on direct review did not violate Medellin's constitutional rights. State Habeas Record at 214, ¶7.

The state habeas court's decision on this issue was not unreasonable in light of the facts of this case. Medellin based his arguments to the trial court only on an alleged pattern of strikes used by the State. Those strikes, however, did not demonstrate a markedly disproportionate application against members of a particular racial group or gender. The composition of the jury in this case does not suggest the exclusion of a cognizable group. The state habeas court found that Medellin did not make a prima facie case for discrimination; this Court agrees.[23]

[23] Medellin argues that he made a prima facie case for discriminatory intent, but also claims that the State did not provide any race-neutral explanation for its strikes. Generally, once a State provides a race-neutral explanation the question of whether a defendant has made a prima facie case becomes moot. *See Ladd v. Cockrell*, 311 F.3d 349, 355 (5th Cir. 2002). Here, the trial court did not ask the State to explain its strikes; the State addressed the defense's objection on its own initiative. Tr. Vol. 26 at 12. The State's explanation, that the jury represented a "melting pot," challenged the establishment of a prima facie case.

After the State challenged the defense's prima facie case, the trial court went off the record. The record is silent as to whether the trial court and the parties continued discussing the *Batson* challenge. Medellin has not provided affidavit or other evidence that would indicate what transpired during the off-the-record discussion. The discussion, however, is of no moment. Medellin has failed to make a prima facie case of discrimination, both in state and federal court. While a *Batson* challenge may rest on either the discrete circumstances of a particular strike or a showing of historic, systemic discrimination, *see Batson*, 476 U.S. at 96, Medellin only shows that, while accepting minority and male jurors, the State struck some African-Americans and men. He has not shown a "pattern of strikes" against a protected group. *See id.* at 97. The absence of a pattern is evident from the fact that at least four minorities and an equal number of men and women served as jurors at trial.

The state court also made a credibility determination that must be presumed correct under 28 U.S.C. § 2254(e)(1). The state habeas court, based on its experience with the prosecutor and on its observation of the proceedings, found that the State did not engage in discrimination. Medellin makes no showing to the contrary. The record before the Court would suggest that the state determination is correct. The state court's rejection of this claim was not unreasonable. *See* 28 U.S.C. § 2254(d)(2). This claim is denied.

## IV. *Brady* Claim

Medellin contends that the State failed to disclose material evidence before trial. Medellin argues that the State violated his constitutional rights by not disclosing the fact that one witness at trial, Joe Cantu, had previously been arrested for an unrelated charge that had been

dropped. Medellin assumes that the State dropped the charges in exchange for his trial testimony. Also, Medellin argues that the State failed to disclose important impeachment evidence by not passing along the fact that Joe Cantu and his wife unsuccessfully sought compensation and protection from the police in return for their testimony.

A. *Background*

Before trial, Medellin requested that the State turn over any exculpatory evidence, including "[a]ny 'deals,' whether expressly written or implied, to any individual who agrees to testify for the State in this case." Tr. Vol. I at 44, 67-74. In an August 17, 1994, pre-trial hearing, the State agreed to "run out of an abundance of precaution the criminal records of any witnesses." Tr. Vol. 26 at 28. The trial court also ordered the State to provide the defense with information about any witness' "final convictions and felonies," along with any witness' placement on deferred adjudication. Tr. Vol. 26 at 29. The, trial court then questioned the need for disclosure of arrest records:

| | |
|---|---|
| Trial court: | Why would arrest records be relevant? |
| Trial counsel: | Well, Your Honor, it could possibly go to any kind of agreements that could possibly have been made. I certainly don't believe there are any. |
| Trial court: | You have a separate motion for that? |

Trial counsel: Right. But that's why it could possibly be relevant in this motion as well.

Trial court: Well, the arrest records I don't believe are relevant except and to the extent that they provide the basis for some type of an agreement by the District Attorney's Office. So articulate some reason why they might be or some bias

Trial counsel: In other words, if somebody has a case dismissed in order that he might testify.

Trial court: I think your Motion to Disclose or to Reveal the Agreements—

Trial counsel: That covers—that should cover it.

Trial counsel: So then denied as to the arrest records and granted as to the conviction records, is that correct?

Trial court: Yes. And the conviction includes things like deferred adjudication and probation and, of course, your Brady Motion covers all of this. So if there is something that is somehow exculpatory about an arrest—

Trial counsel: The State's witness—

Trial court: Right. Or if it reveals some type of bias on the part of the witness, I expect that it should be disclosed under—